
THE PRESSES WON'T STOP JUST YET: SHAPING STUDENT SPEECH RIGHTS IN THE WAKE OF *HAZELWOOD*'S APPLICATION TO COLLEGES

JEFF SKLAR*

I. INTRODUCTION

As word of the decision in *Hosty v. Carter*¹ spread in the summer of 2005, many college journalists were outraged. To them, it was the end of free speech as they knew it. In *Hosty*, the en banc Seventh Circuit became the first court to apply in a college the framework of the Supreme Court's *Hazelwood* case, which for nearly twenty years had given high school administrators wide latitude to restrict the content of student-run newspapers.² As a result, many college journalists believed they were powerless against university presidents and deans, who they believed could charge into their newsrooms, lock up their computers, and even stop their presses—all with the blessing of the First Amendment.

In truth, the outrage did not begin with *Hosty*. It began seventeen years earlier with the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*. In *Hazelwood*, the Supreme Court held that in high schools, where school-sponsored student speech does not occur in a public forum, the school may regulate the content of that speech for reasons that are "reasonably related" to any of a range of "legitimate pedagogical

* Class of 2007, University of Southern California Gould School of Law; B.A. 2004, University of Arizona. I am grateful to Professor Michael Shapiro for his thorough comments. Thanks also to Mark Woodhams and Ray Catalino for their comments and help identifying necessary sources, and to the staff and editors of the *Southern California Law Review*, especially Julie Huebner, Whitney Meehan, and Heather Weisser. This Note is dedicated to my parents, Bob and Mary Sklar, for their years of unconditional love and support.

1. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006).
2. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

concerns.”³ Thus, many people believed *Hazelwood* gave high school administrators near free reign to stop students from participating in one of our nation’s most sacred traditions—a free and independent press.⁴ And in *Hazelwood*, the Supreme Court explicitly left open the possibility that the case’s analytical framework might be applied to student publications in colleges too. But until June 2005, no court had dared to do so.⁵ *Hosty* was the first.

The outrage was predictable. It was as if the sky had fallen.⁶ But had it?

Not even close.

Hazelwood’s application in colleges is unlikely to lead to a substantial contraction of college students’ rights. Most of *Hosty*’s critics are grasping at straws, trying to find fault in a decision that, for two reasons, changes little to nothing about students’ rights. First, most college student publications are probably public forums, and *Hazelwood*’s “legitimate pedagogical concerns” test will not apply to them. Second, publications that are nonpublic forums appear to be subject to less administrative control than many of *Hosty*’s critics believe. While it is true that in jurisdictions that follow *Hosty*, these nonpublic forum publications would be subject to

3. *Id.* The most prominent forums for school-sponsored student speech are student publications, especially when they are funded in part by the school, employ school staff as advisers, are produced as part of a class, or use school facilities and resources. Other examples of school-sponsored student speech include school plays and concerts, but this Note focuses mainly on student publications.

4. Of course, even before *Hazelwood*, it was hardly uncommon for high schools to restrict the content of their student newspapers. In 1986, two years before the *Hazelwood* decision, the Student Press Law Center reported hearing about 548 attempts to do so. See Mark J. Fiore, Comment, *Trampling the “Marketplace of Ideas”: The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1929 (2002). By 1997, it had heard of 1588 attempts. *Id.* It is, of course, far from certain that *Hazelwood* is the sole cause of this increase. Other factors could include the increased prominence of the Student Press Law Center itself, which could make a difference in the percentage of attempts that were actually reported.

5. Two courts had even passed up the opportunity to apply *Hazelwood*’s framework to the college context (although in reality, one of them did apply it despite the explicit rejection). See Kincaid v. Gibson, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) (holding that in the context of college yearbook censorship, “*Hazelwood* has little application,” but going on to conduct the same analysis required by *Hazelwood*); Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) (“*Hazelwood* . . . is not applicable to college newspapers.”). For a more thorough discussion of these cases, see Part II.C.2, *infra*.

6. Mike Hiestand, *The Hosty v. Carter Decision: What It Means*, TRENDS IN C. MEDIA, July 6, 2005, <http://www.studentpress.org/acp/trends/~law0705college.html>. Referring to the date the *Hosty* opinion was announced, Hiestand wrote, “For about ten years now, we’ve had a bit of a Chicken Little Complex. . . . Well, it turns out that Chicken Little was right: on June 20 the sky did, in fact, fall for some college student media.” *Id.* Hiestand was hardly alone in condemning *Hosty*. See Part III.C, *infra*, for a chronicle of the reaction to this case, which was overwhelmingly negative.

the “legitimate pedagogical concerns” test, there are powerful reasons to believe there are fewer “legitimate pedagogical concerns” in colleges than there are in high schools.

Perhaps surprisingly, though, no cases or articles have ever defined which concerns would or should be considered “legitimate” in colleges. This Note proposes a two-pronged, disjunctive test to fill that void. Under the first prong, colleges would have a “legitimate pedagogical concern” in restricting student speech where the speech fails to fulfill the requirements of the assignment that gave rise to the speech in the first place. Under the second prong, colleges would have a “legitimate pedagogical concern” where one could reasonably believe that the speech is excluded from First Amendment protection or that it might give rise to a legal cause of action, such as invasion of privacy or defamation.

Part II of this Note tracks the development of the law relating to students’ free speech rights on campus, emphasizing the *Hazelwood* decision and the post-*Hazelwood* contrasts between the rights of high school students and college students. Part III discusses the *Hosty* case, especially the Seventh Circuit’s en banc decision, and its reverberations in the college media community. Part IV demonstrates that even after *Hosty*, most student publications probably will not face a heightened risk of administrative interference because they are public forums, and even those publications that are nonpublic forums are likely to have substantial protection. Part V argues that colleges should have fewer “legitimate pedagogical concerns” than high schools, and introduces the two-part test just described.

II. STUDENT SPEECH LAW

A. PUBLIC FORUM DOCTRINE

When government officials attempt to prohibit or punish speech that occurs on public property or uses some publicly funded medium of expression, the constitutionality of their actions often depends on whether that property or medium is compatible with free speech by members of the public. This idea is known as the public forum doctrine. Under this doctrine, different levels of judicial deference, or standards of review, are applied to regulations on speech depending on whether the speech occurs in one of three types of forums.

The first type of forum is the traditional public forum. The Supreme Court has defined a traditional public forum as a place or medium that has

“immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁷ Examples of such forums include public parks and streets.⁸ In a traditional public forum, government may regulate speech on the basis of content only if the regulation is necessary to further a compelling state interest and is narrowly tailored to achieve that interest.⁹ This test is often referred to as strict scrutiny,¹⁰ and regulations subject to strict scrutiny are upheld in only the rarest of circumstances in the public forum context.¹¹

The second type of forum is called a limited public forum.¹² A limited public forum does not qualify as a traditional public forum, but is nonetheless opened by the government to public speech.¹³ Unlike traditional public forums, which courts consider to be public forums even in the absence of some governmental action affirming a public right to speak there, limited public forums can be created only when government

7. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (internal quotations omitted) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

8. *Id.*

9. *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). In a traditional public forum, government may also create and enforce content-neutral time, place, and manner restrictions, provided they are narrowly tailored to achieve a significant government interest and leave open ample alternative channels of communication. *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535–36 (1980). Time, place, and manner restrictions, however, are not relevant to the content of this Note.

10. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

11. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding the constitutionality of a Tennessee regulation banning political campaigning within 100 feet of polling places on the grounds that the rule protected citizens' right to vote freely); *Buckley v. Valeo*, 424 U.S. 1, 24–29 (1976) (holding that a law limiting campaign contributions met strict scrutiny because it focused on stopping the corruption potentially caused by large contributions). *Burson* and *Buckley* truly are rare cases, as most government regulations subject to strict scrutiny are struck down. According to one constitutional law treatise, “[a]lthough history shows that strict scrutiny is rarely met, occasionally the Court finds that the test is satisfied.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1089 (2d ed. 2002). *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 795–96, 850–51 (2006) (concluding, on the basis of empirical research, that while strict scrutiny is satisfied thirty percent of the time in the federal courts, it is only satisfied four percent of the time when the issue involves viewpoint discrimination in public forums).

12. Limited public forums are sometimes referred to as “public forums by designation,” or similar terms. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (referring to the “public forum created by government designation”).

13. *Perry*, 460 U.S. at 45. Occasionally, courts try to find a distinction between limited and designated public forums, although the distinction is not relevant for the purposes of this Note. *See, e.g., Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1203 n.8 (9th Cir. 2006) (arguing that a designated public forum is a forum that government has intentionally opened for any purpose, while a limited public forum is a nonpublic forum that government has opened to particular people for particular purposes, and that nonviewpoint-based regulations in limited public forums are subject to a reasonableness analysis, not strict scrutiny).

intends to open the forum to the public for general use, or for speech on a particular subject, or by particular people.¹⁴ Government need not specifically call a forum a “limited public forum” in order for a forum to have that status; there merely needs to be a practice of opening the facility to speech.¹⁵ Similarly, just because a particular part of a larger entity is a limited public forum, it is not necessarily true that the entire entity is a public forum.¹⁶ In a limited public forum, content-based restrictions must also meet strict scrutiny.¹⁷ Government is not required to leave limited public forums permanently open,¹⁸ although the Court has implied, and lower courts have said explicitly, that when government decides to close a limited public forum, it may do so only for content-neutral, or at least viewpoint-neutral, reasons—not because it disapproves of what is being said in the forum.¹⁹

The final type of forum is a nonpublic forum. Most public property that does not fall into either of the other two categories is considered a nonpublic forum.²⁰ The reason not all public property is a public forum is because government has the right to ensure that property under its control may be used for its proper, lawful purpose.²¹ In nonpublic forums,

14. See *Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 45–46.

15. For example, in *Widmar v. Vincent*, the Court found that a university had turned its facilities, such as its classrooms, into a limited public forum, at least to the degree that doing so did not interfere with the school’s educational mission, by making those facilities available to student groups. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). For a discussion of *Widmar*, see Part II.C.1, *infra*.

16. See, e.g., *Perry*, 480 U.S. at 45–47 (focusing solely on the faculty mailboxes, and not the school as a whole, as a forum).

17. *Id.* at 46.

18. *Id.*

19. See *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 82–83 (D.D.C. 2004) (holding that the government could close a limited public forum for viewpoint-neutral reasons); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65, 74 (D.D.C. 2000) (“Even if [government] designated . . . property as a public forum in which citizens were permitted to gather signatures for initiatives, [it] is permitted to close that designated public forum to such a use in the future, so long as the closure is not content-based.” (emphasis added)). For a definition of viewpoint discrimination, see *infra* note 24 and accompanying text. But see *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (noting that the government may close a limited public forum “whenever it wants”).

20. *Perry*, 460 U.S. at 46. Government property is not necessarily a forum. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (finding that government properties that are not public forums are “either nonpublic fora or not fora at all”). For example, a court would likely conclude that a government-owned nuclear reactor simply is not a forum at all because it wholly defies common sense to think that a nuclear reactor would be open to the public, except under extremely supervised conditions.

21. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 728 (1990) (holding that a sidewalk leading from a post office’s parking lot to its front door was a nonpublic forum because its purpose was solely to help post office customers walk from their cars to the post office’s front door). Of course,

governmental regulations are not subject to strict scrutiny; rather, government may enact and enforce “reasonable” restrictions on speech to ensure that the forum is used for its intended purposes.²² If the restriction is based on the viewpoint of the speech, however, it typically must meet strict scrutiny.²³ A restriction is based on viewpoint when it does not restrict all speech about a particular subject, but restricts only speech that articulates a particular position about that subject.²⁴

B. REGULATIONS ON STUDENT SPEECH IN HIGH SCHOOLS

1. *Tinker*: Limiting Schools’ Freedom to Regulate Speech

When confronted with questions of whether schools can restrict the speech of their students, the Court often asks whether the school, or the particular medium of expression within the school, is a public forum. For the past quarter century, it has often asked the question explicitly.²⁵ But the case that first asked the question of whether students, speaking in their public schools, have the same free speech rights as other citizens, is better characterized as an implicit forum analysis.

This was, of course, the landmark 1969 case of *Tinker v. Des Moines Independent Community School District*.²⁶ *Tinker* is a landmark case because it was the Supreme Court’s first attempt to balance students’ rights to speak freely with a school’s need to regulate speech in order to create an appropriate learning environment. In *Tinker*, the Court came down heavily on the side of the students.

Tinker involved a group of students in Des Moines, Iowa, who wore black armbands to school in protest of the Vietnam War, though a school policy prohibited such conduct.²⁷ The students sued, claiming the policy

public sidewalks are used primarily for purposes of locomotion as well and are still public forums. The distinction between normal sidewalks and the postal sidewalk in *Kokinda* was that the postal sidewalk was neither a “place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment,” nor a necessary means of facilitating commerce. *Id.* at 727–28.

22. See *Perry*, 460 U.S. at 46.

23. *Id.* at 48–49.

24. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119–20 (2001) (holding that a school engaged in viewpoint discrimination when it refused to allow a religious club to meet on campus).

25. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (discussed *infra* Part II.B.2); *Widmar v. Vincent*, 454 U.S. 263, 267–69 (1981).

26. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

27. *Id.* at 504.

violated their First Amendment rights.²⁸ The Court, in an opinion by Justice Fortas, first noted that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁹ But the Court also recognized that these free speech rights sometimes conflict with states’ and school districts’ need to regulate conduct in the schools.³⁰ To resolve this conflict, the Court held that the school could regulate the students’ conduct only if it had evidence that the regulation was necessary to avoid a “material and substantial interference with schoolwork or discipline.”³¹ Because the wearing of an armband did not substantially disrupt the school day, the Court held that the school’s actions were unconstitutional.³²

Although *Tinker* did not use the phrase “public forum” and did not explicitly employ a forum analysis, some courts and commentators have suggested that the Court implicitly found that schools are public forums, or at least something resembling public forums.³³ This seems to be the most plausible reading of *Tinker*, given that the Court discussed the importance of speech in a particular setting and adjusted the standard of review in light of that setting. That type of analysis, of course, is the hallmark of the public forum doctrine.

Regardless of the type of analysis undertaken, there can be little doubt that in *Tinker*, the Court valued the speech rights of the students more highly than the school’s need to regulate student conduct, although it surely did not give students unlimited rights or take all regulatory power away from schools.³⁴ Advocates of this conclusion called *Tinker* a critical decision in ensuring that students could be prepared for life as free-thinking and free-speaking participants in a democracy.³⁵ One commentator argued that without some constraints on the power of school officials to restrict student speech, the schools would, in effect, be allowed to inculcate values

28. *Id.*

29. *Id.* at 506.

30. *Id.* at 508.

31. *Id.* at 511.

32. *Id.* at 514.

33. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 823 n.3 (1985) (Blackmun, J., dissenting) (arguing that *Tinker* should be read as finding that schools are limited public forums because *Tinker* required a strict showing that the student speech was incompatible with the nature of the forum, and such a showing is not required in nonpublic forums); Andrew H. Montroll, Note, *Students’ Free Speech Rights in Public Schools: Content-based Versus Public Forum Restrictions*, 13 VT. L. REV. 493, 513–14 (1989).

34. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1662–63 (1986).

35. See, e.g., *id.*

that contradict the Constitution, which values and protects dissent.³⁶ Another commentator emphasized that the First Amendment is intended to create a “marketplace of ideas,” and that *Tinker* preserves that concept in a school setting.³⁷

Justice Black dissented in *Tinker*, arguing that the “material and substantial interference” standard did not give schools sufficient control over the learning environment.³⁸ He wrote that the primary purpose of schools is to teach students, not to give them a forum for speech.³⁹ Although the *Tinker* majority disagreed with Black on the appropriate amount of deference to give to schools, it did not take too many years for Black’s opinion to gain traction in the Court.⁴⁰

2. *Hazelwood*: More Expansive Power for School Authorities

Tinker has never been overruled, and its “schoolhouse gate” line is quoted so frequently that it is likely familiar to many high school civics students.⁴¹ But in the 1988 case of *Hazelwood School District v. Kuhlmeier*, the Court substantially curbed students’ freedom to speak in schools, at least when that speech uses school-sponsored mediums.⁴² *Hazelwood* is also noteworthy because it was the first time the Court specifically applied the public forum doctrine when evaluating student speech in a school.⁴³

Hazelwood involved a school newspaper written and edited by students in a journalism class at a Missouri public high school.⁴⁴ The newspaper, called *Spectrum*, was funded in part by the school board.⁴⁵ It

36. *See id.* at 1678.

37. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?* 48 *DRAKE L. REV.* 527, 545 (2000). The concept of the “marketplace of ideas” has its judicial origins in Justice Holmes’s famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919). Holmes wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Id.* at 630 (Holmes, J., dissenting).

38. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524–26 (1969) (Black, J., dissenting).

39. *Id.* at 522. Black’s dichotomy is not completely accurate, of course. In many cases, giving students a forum for speech is itself a teaching tool.

40. In another school speech case that has little relevance to this Note, the Supreme Court held that a school could restrict the “lewd and indecent speech” of a student at an assembly. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

41. A quick search on Westlaw shows that the “schoolhouse gate” line has been quoted in 283 federal cases and 816 law review articles, as of January 10, 2007.

42. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

43. *Id.* at 267.

44. *Id.* at 262.

45. *Id.* at 262–63.

was the students' practice to submit final page proofs to the school principal before sending them to the printer for publication.⁴⁶ After reviewing the proofs for the May 1983 issue, the principal expressed concern about a story dealing with teen pregnancy and a story dealing with divorce. He believed both stories were inappropriate for the younger students.⁴⁷ As a result, he directed *Spectrum's* faculty adviser not to print the pages on which the pregnancy and divorce articles appeared.⁴⁸ Several of the newspaper's student staff members sued, claiming the school's action violated their First Amendment rights.⁴⁹

Unlike in *Tinker*, the Court in *Hazelwood* began its analysis by asking whether *Spectrum* was a public forum.⁵⁰ Justice White, writing for the majority, applied the public forum test rather than *Tinker's* test because the students were asking the school to "sponsor" their speech by giving them access to school resources and funds to produce the newspaper, not merely to tolerate speech that happened to occur on school grounds.⁵¹ In its public forum analysis, the Court noted that the newspaper was being published as part of a journalism class in a "laboratory situation,"⁵² that students received course credit and a grade for their work in the class, that both a faculty adviser and the principal reviewed the newspaper before it went to press, and that, contrary to the students' assertions, they were not permitted to print "practically anything" they wanted.⁵³ Based on those factors, the Court held that the school had not opened the paper for "indiscriminate use"⁵⁴ by either the student editors or the student body at large, but rather that it reserved the forum to be a "supervised learning experience."⁵⁵ Therefore, *Spectrum* was not a limited public forum, but a nonpublic forum.⁵⁶

46. *Id.* at 263.

47. *Id.* He believed that the article on divorce was not sufficiently fair and balanced, and that the pregnant students whose identities were concealed in the article might still be identifiable. *Id.*

48. *Id.* at 264.

49. *Id.*

50. *Id.* at 267.

51. *Id.* at 270–71.

52. *Id.* at 268 (internal quotations omitted) (quoting the Hazelwood East Curriculum Guide).

53. *Id.* at 268–69 (internal quotations omitted) (quoting *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1456 (E.D. Mo. 1985)).

54. *Id.* at 270 (internal quotations omitted) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

55. *Id.*

56. *Id.*

Because *Spectrum* was a nonpublic forum, the Court then had to ask whether the school's action was reasonable.⁵⁷ In answering the question, it created the standard that now governs student speech cases in which the school is being asked to promote, rather than merely tolerate, the speech. It held, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."⁵⁸ It then said that under this standard, schools may stop the publication of student newspapers when the speech is, "for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."⁵⁹

Specifically, the Court said that under this standard, schools may regulate "student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'"⁶⁰ It also gave specific examples of speech that might be unsuitable for immature audiences, from articles about "the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting."⁶¹

The Court then concluded that the principal had acted reasonably in stopping the newspaper's publication of the two offending articles. It held that the principal could reasonably have concluded that the students had not mastered the journalistic techniques necessary to report on controversial and sensitive topics such as teen pregnancy or divorce.⁶²

In an important footnote, the Court also stated that it was not deciding whether the "legitimate pedagogical concerns" standard applied in colleges as well as high schools. The footnote states, "[w]e need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."⁶³

Justice Brennan dissented. He warned that *Hazelwood's* standard could allow schools too much freedom to regulate student speech that is

57. Recall that under *Perry* and other public forum cases, content-based restrictions in nonpublic forums are subject to a reasonableness test unless they are based on viewpoint, in which case they are subject to strict scrutiny.

58. *Hazelwood*, 484 U.S. at 273.

59. *Id.* at 271.

60. *Id.* at 272 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

61. *Id.*

62. *Id.* at 276.

63. *Id.* at 273 n.7.

acceptable, even desirable, provided they could argue that the speech had minimally interfered with the school's ability to inculcate its own message. For example, "[a] student who responds to a political science teacher's question with the retort, 'socialism is good,' subverts the school's inculcation of the message that capitalism is better."⁶⁴ The freedom to regulate such speech, he warned, could turn schools into "'enclaves of totalitarianism' . . . that 'strangle the free mind at its source.'"⁶⁵ It was "particularly insidious," Brennan concluded, that the institutions entrusted with teaching children about the importance of freedom and democracy would be given such freedom to intrude on individual liberties.⁶⁶

Many commentators picked up on the themes in Brennan's dissent, and likened *Hazelwood* to a death knell for students' free speech. More than one commentator argued that after *Hazelwood*, students do indeed shed their constitutional rights at the schoolhouse gate, despite the Court's statements to the contrary.⁶⁷ The current and former executive directors of the Student Press Law Center, which advocates for broad student press freedoms, argued that after *Hazelwood*, students are little more than passive recipients of societal values, rather than active participants in the democratic process.⁶⁸ They argued that students with limited free speech rights will become cynical about the importance of democracy, and be less likely to pursue careers in either public service or journalism.⁶⁹

Commentators such as Bruce Hafen and Jonathan Hafen were more sympathetic to the *Hazelwood* majority. In an article that echoed and expanded on the themes of Justice Black's *Tinker* dissent, they argued that *Hazelwood's* rule actually helps prepare students to participate in democracy by ensuring that they are taught the basic skills and values needed to function properly in society.⁷⁰ Teaching these values, Hafen and Hafen argued, requires that some of their legal rights be temporarily withheld while they learn to exercise those rights responsibly.⁷¹ They also argued that if schools were not free to withhold these rights, and students

64. *Id.* at 279 (Brennan, J., dissenting).

65. *Id.* at 280 (internal citations omitted) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

66. *Id.* at 290.

67. See J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 723–24; Chemerinsky, *supra* note 37, at 545.

68. Abrams & Goodman, *supra* note 67, at 722–23.

69. *Id.* at 723.

70. Bruce C. Hafen & Jonathan O. Hafen, *The Hazelwood Progeny: Autonomy and Student Expression in the 1990's*, 69 ST. JOHN'S L. REV. 379, 379–419 (1995).

71. *Id.* at 388–89.

were free to question authority through whatever means they wanted, students' long-term interests in autonomy would be harmed because they would not have a chance to develop the skills and maturity necessary to exercise their rights responsibly and effectively.⁷²

3. *Hazelwood's* Application in the Lower Courts

In the nearly twenty years since *Hazelwood*, lower courts have repeatedly upheld high schools' attempts to regulate the content of school-sponsored student speech. For example, they have allowed schools to remove a racially offensive mascot⁷³ and stop the publication of a birth control advertisement in the student newspaper.⁷⁴ Other courts have applied *Hazelwood* to find that schools could regulate, for example, the classroom speech of teachers⁷⁵ and the content of textbooks.⁷⁶

Despite the broad power to regulate student speech that *Hazelwood* has given schools, some courts have made clear that this power is not without its limits. For example, a federal district court held in *Draudt v. Wooster City School District Board of Education* that a high school had turned its student newspaper into a limited public forum, which made the "legitimate pedagogical concerns" test inapplicable.⁷⁷ In another student newspaper case, *Desilets v. Clearview Regional Board of Education*, the

72. *Id.* at 385–86. The Court in 1995 reaffirmed that it still subscribes, at least in large part, to the view of Hafén and Hafén, at least as it relates to high schools. The Court quoted with approval a line from an earlier case stating that for many purposes "school authorities [a]ct *in loco parentis*." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).

73. *Crosby v. Holsinger*, 852 F.2d 801, 802 (4th Cir. 1988) (upholding a Virginia school's decision to remove "Johnny Reb" as its mascot, finding that the school was reasonably concerned that the mascot "offended blacks and limited their participation in school activities").

74. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829–30 (9th Cir. 1991) (en banc) (upholding a school's decision to prevent its newspaper from publishing an advertisement for birth control and pregnancy testing because it had a legitimate concern in maintaining a neutral stance on controversial issues such as teen pregnancy).

75. *See, e.g., Ward v. Hickey*, 996 F.2d 448, 452–54 (1st Cir. 1993) (upholding a school's decision not to rehire a biology teacher who had discussed the abortion of fetuses with Down Syndrome).

76. *Virgil v. Sch. Bd.*, 862 F.2d 1517, 1523–25 (11th Cir. 1989) (upholding a school district's decision to remove from the curriculum a textbook containing Aristophanes' *Lysistrata* and Chaucer's *The Miller's Tale* because, even though the works are considered classics, they could be considered too sexually explicit and vulgar for school audiences).

77. *Draudt v. Wooster City Sch. Dist. Bd. of Educ.*, 246 F. Supp. 2d 820, 828–29 (N.D. Ohio 2003) (holding that the school had created a limited public forum, even though the newspaper was produced for course credit because it had a policy noting that the newspaper existed in part to teach students about free speech, many copies were distributed off campus, and the school principal and adviser exercised minimal control over the newspaper).

court overturned a school's decision to prohibit the newspaper from publishing a review of an R-rated movie.⁷⁸

A few states have also limited *Hazelwood's* reach by passing statutes or administrative regulations granting heightened protection to student speech in high schools. For example, California prohibits schools from punishing students for speech that would be protected under the U.S. Constitution if it occurred in public.⁷⁹ In Colorado, a similar law declares that school-sponsored student publications are public forums and prohibits the prior restraint of student publications except when the publications contain speech that is libelous, obscene, or falls under one of several other narrow exceptions.⁸⁰ The Pennsylvania Code also prevents schools from restricting the content of student newspapers, except where the content falls outside the *Tinker* standard.⁸¹ Many other states considered similar legislation in the years immediately following *Hazelwood*, but most of them rejected it.⁸²

C. REGULATIONS ON STUDENT SPEECH IN COLLEGES AND UNIVERSITIES

1. Pre-*Hazelwood* Cases

Unlike *Hazelwood*, *Tinker* contained no language limiting its holding to high schools. Thus, any analysis of student speech rights in colleges must begin by noting that *Tinker*, and its broad protection of student speech, is the beginning of the Court's college speech jurisprudence. Once *Tinker* was decided, however, it took just three years for the Court to hear a

78. *Desilets v. Clearview Reg'l Bd. of Educ.*, 647 A.2d 150, 151 (N.J. 1994). The court's decision was based on the fact that the school did not have a clearly defined policy of restricting speech about R-rated movies. It noted, however, "[t]he foregoing does not mean that the school had no legitimate pedagogical concerns over the publication of articles dealing with R-rated movies." *Id.* at 154.

79. CAL. EDUC. CODE § 48950 (West 2006). Prior to *Hazelwood*, California also codified the *Tinker* "substantial disruption" standard for student speech, including school-sponsored student newspapers. *See* CAL. EDUC. CODE § 48907 (West 2006).

80. COLO. REV. STAT. § 22-1-120 (2002).

81. 22 PA. CODE. § 12.9 (2006). *See also* IOWA CODE ANN. § 280.22(3) (1996) (stating that "[t]here shall be no prior restraint of material prepared for official school publications except when the material" is obscene, libelous, slanderous, unlawful in and of itself, a violation of school regulations, or a violation of the *Tinker* "material and substantial disruption" standard); KAN. STAT. ANN. § 72-1506(a) (2002) ("The liberty of the press in student publications shall be protected. School employees may regulate the number, length, frequency, distribution and format of student publications. Material shall not be suppressed solely because it involves political or controversial subject matter.").

82. Hafen & Hafen, *supra* note 70, at 406 nn.150-51 (listing sixteen states that rejected such legislation out of twenty-two that considered it).

case that dealt squarely with a college's ability to restrict student speech on campus.

In that case, *Healy v. James*,⁸³ the Court followed a similar line of reasoning as it did in *Tinker*. *Healy* dealt with a college president's refusal to grant official recognition to a student group that was at least loosely affiliated with Students for a Democratic Society, a radical national student group that protested and demonstrated against the Vietnam War.⁸⁴ The national group had been involved with break-ins, arson, and other offenses on a variety of campuses, a fact that worried the college president.⁸⁵

After noting the tension between students' speech rights and schools' need to create an appropriate academic environment, the Court, in an opinion by Justice Powell, squarely stated that on college campuses, free speech must usually win out.⁸⁶ "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" Powell wrote.⁸⁷ Ultimately, the Court rejected most of the president's proffered justifications for denying the group recognition, but remanded the case to the lower court because one of the justifications may have been legitimate.⁸⁸

A year later, in *Papish v. Board of Curators of the University of Missouri*, the Court again struck down a university's attempt to restrict student speech on campus.⁸⁹ *Papish* dealt with an employee of an unofficial student newspaper that was sold on campus pursuant to an agreement with the university.⁹⁰ The employee, who was also a graduate student, was expelled from the university for distributing a newspaper that contained a political cartoon of policemen raping the Statue of Liberty and the Goddess of Justice, as well as an article entitled "M[other]f[ucker]

83. *Healy v. James*, 408 U.S. 169 (1972).

84. *Id.* at 171-72, 174. For background on Students for a Democratic Society, see Students for a Democratic Society, Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/Students_for_a_Democratic_Society (last visited Mar. 6, 2007).

85. *Healy*, 408 U.S. at 171, 174 n.4.

86. *Id.* at 180-81. Justice Powell wrote, "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* at 180.

87. *Id.* at 180 (internal quotations omitted) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

88. *Id.* at 194.

89. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 671 (1973) (per curiam).

90. *Id.* at 667.

Acquitted.”⁹¹ The university claimed she had violated a campus policy prohibiting “indecent conduct or speech.”⁹²

The Court, in a brief per curiam opinion that relied largely on *Healy* and *Tinker*, held that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of ‘conventions of decency’” alone.⁹³ It then ordered the student reinstated, unless the university had a valid academic reason for keeping her out of the program.⁹⁴

Like *Tinker*, *Healy* and *Papish* did not employ forum analysis, but also like *Tinker*, it would seem reasonable to interpret *Healy* and *Papish* as supporting an understanding of college campuses as public forums. After all, *Healy* and *Papish* both based their conclusions on an understanding that the specific nature of the college campus makes unfettered free speech especially appropriate. The next college speech case, *Widmar v. Vincent*, lent further support to this conclusion and, in doing so, formally employed a forum analysis.⁹⁵

Widmar involved a Christian student group that had regularly sought and received recognition as an official student group at the University of Missouri at Kansas City.⁹⁶ But in 1977, the university suddenly informed the group that it would no longer be recognized, citing a university policy prohibiting the use of school grounds for religious worship or teaching.⁹⁷ Several members of the student group sued.⁹⁸

The Court, in an opinion by Justice Powell, ruled that the university had turned its facilities into a public forum for student groups because it had a policy of generally opening them to those groups.⁹⁹ In a footnote,

91. *Id.* The article discussed the assault trial and acquittal of a member of a group called “Up Against the Wall, Motherfucker.” *Id.* at 667–68.

92. *Id.* at 668 (internal quotations omitted) (quoting the school’s General Standards of Student Conduct).

93. *Id.* at 670.

94. *Id.* at 671. Justice Rehnquist wrote a dissent, which was joined by Chief Justice Burger and Justice Blackmun. The dissent largely echoed the themes that eventually won over the Court in *Hazelwood*—that school administrators need greater control over student conduct in order to create an appropriate learning environment. Rehnquist, however, also emphasized the importance of keeping taxpayers, who support the university, from becoming disenchanted with the conduct of their students. He also argued that the word “motherfucker” should be considered obscene. *Id.* at 673–78 (Rehnquist, J., dissenting).

95. *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981).

96. *Id.* at 265.

97. *Id.*

98. *Id.* at 266.

99. *Id.* at 267–68.

Powell also noted that the Court had historically recognized that “a public university, at least for its students, possesses many of the characteristics of a public forum.”¹⁰⁰ Therefore, it held that the university’s decision to deny access to the Christian group would be subject to strict scrutiny, which it failed.¹⁰¹

Throughout the pre-*Hazelwood* years, lower courts were also dealing with the constitutional issues of regulating college and university student speech. But unlike the Supreme Court, which never dealt with a school-sponsored student publication case, lower courts had numerous opportunities to evaluate the constitutionality of regulating student publications. Like *Tinker*, these cases did not generally apply explicit forum analysis. But many of them applied *Tinker*’s “material and substantial disruption” standard; in doing so, they were arguably conducting forum analysis because they altered the standard of review in light of the appropriateness of the forum to unregulated speech.¹⁰² The holdings of these cases were generally in line with *Healy*, *Papish*, and *Widmar*, as they granted the student publications wide speech rights and the schools only limited power to regulate the publications’ content.¹⁰³

100. *Id.* at 267 n.5. The Court’s qualifying, “many of the characteristics,” language did make clear, however, that universities are not traditional public forums, open to unfettered speech by all comers. For example, the Court noted that students have broader speech rights on university campuses than nonstudents and that speech rights do not necessarily extend to all the buildings and offices on campus. *Id.* For further discussion on the understanding of college campuses as public forums, see, for example, John S. Greenup, *Chalk Talk, The First Amendment and the Right to Hate*, 34 J.L. & EDUC. 605, 608–10 (2005); Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 481–512 (2005).

101. *Widmar*, 454 U.S. at 270–77. The university’s conduct failed strict scrutiny because, although it had argued that it denied access to the group in order to comply with the Establishment Clause of the First Amendment, the Court held that merely opening a forum to a religious student group would not be a violation. *Id.* at 272 & n.12.

102. See, e.g., *Joyner v. Whiting*, 477 F.2d 456, 460–61 (4th Cir. 1973) (noting that once a college has a student newspaper, it may not suppress specific content it does not approve of, but also citing *Tinker* as evidence that students’ speech rights are not unlimited); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1336 (D. Mass. 1970) (applying the *Tinker* standard to invalidate an advisory board formed to approve the campus newspaper before releasing funds for printing). For a discussion of why *Tinker* is properly read as involving a forum analysis, see *supra* note 33.

103. See, e.g., *Stanley v. Magrath*, 719 F.2d 279, 280 (8th Cir. 1983) (holding that a university that had historically required students to pay a fee to support the student newspaper could not change its policy to an optional fee where its motivation for doing so was objection to the paper’s contents, specifically a mock interview of Christ on the Cross that “would offend anyone of good taste, whether with or without religion”); *Bazaar v. Fortune*, 476 F.2d 570, 573–74 (5th Cir. 1973) (holding that a university could not stop publication of a literary magazine because it believed some of the language in the magazine was inappropriate), *modified*, 489 F.2d 225 (5th Cir. 1973) (en banc).

2. Post-*Hazelwood* Cases

Though the 1988 *Hazelwood* decision undeniably led to a dramatic shift in the balance of power between high school students and schools, the post-*Hazelwood* lower court cases involving college students' speech make it clear that in most cases, the balance has not similarly shifted in colleges. There, students' free speech rights still are typically held to outweigh colleges' interests in shaping their academic environment.¹⁰⁴ The results do tend to differ, however, depending on whether the speech in question occurs in a closely supervised class or activity, where schools tend to have more freedom to regulate student speech. Indeed, at least one court has explicitly noted that a different analysis is required when the speech in question occurred in a classroom setting.¹⁰⁵ Also, the post-*Hazelwood* lower courts have applied forum analysis with increased frequency.

a. Noncurricular Student Publications Cases

While post-*Hazelwood* courts dealing with content regulations in colleges could have taken advantage of the Supreme Court's refusal in *Hazelwood* to determine the constitutionality as a basis for finding that they were reasonable, they have not done so, preferring to apply *Healy's* "marketplace of ideas" approach.¹⁰⁶

104. This Section is limited to lower court decisions because the post-*Hazelwood* Supreme Court has never dealt with a set of facts similar to *Hazelwood* in a college setting. At least one Supreme Court justice has stated, however, that *Hazelwood*-level deference might not be appropriate in a college setting. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) ("[C]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." (internal citations omitted)). Souter's concurrence was joined by Justice Stevens and Justice Breyer.

105. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 n.6 (10th Cir. 2004). Not all commentators agree, though, that this distinction has merit. See, e.g., Laura K. Schulz, *A "Disacknowledgment" of Post-secondary Student Free Speech—Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-secondary Setting*, 47 ST. LOUIS U. L.J. 1185, 1220–23 (2003) (arguing that "Curricular versus Extracurricular" is an arbitrary distinction unsupported by *Hazelwood*).

106. In the years since *Hazelwood*, the Supreme Court has expressly reaffirmed its support of the college as the "marketplace of ideas." In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court dealt with whether a university could deny recognition to a student group that had an overtly religious purpose. Although *Hazelwood* did not play a central role in the Court's finding that the university violated the Constitution by refusing to recognize the group, the Court noted that the danger of suppressing student speech

is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

Id. at 835–36 (internal citations omitted).

Perhaps the most celebrated of the post-*Hazelwood* college publication cases was *Kincaid v. Gibson*, a 2001 case in which the en banc Sixth Circuit rejected a university's efforts to stop distribution of its student-produced yearbook.¹⁰⁷ The student editor of the yearbook at Western Kentucky University had produced the book with minimal oversight from the university. After the book had been printed, the university's vice president for student affairs, in consultation with the president, confiscated the yearbooks and refused to allow them to be distributed.¹⁰⁸

After an exhaustive analysis, the Sixth Circuit found that the university had established the yearbook as a limited public forum.¹⁰⁹ It based this finding, in part, on a policy of placing control of student publications in the hands of student editors, the university's practice of exercising virtually no oversight of the yearbook, and the fact that yearbook staff members did not need special permission from the university to include whatever content they chose in the book.¹¹⁰ It also noted that a general understanding of the university as a "marketplace of ideas" suggested that student publications are often public forums.¹¹¹ The court then held that the university's conduct failed strict scrutiny because it was a broadly sweeping restriction that left students with no alternative means of recording their experiences from the school year.¹¹² The court added that even if the yearbook were a nonpublic forum, the university's actions would fail the reasonableness test because the book fulfilled the purposes that the student editor set out to fulfill and because it was a "rash" decision, dramatically disproportionate to the problem.¹¹³

Largely because it concluded that the yearbook was a limited public forum, the court did not claim to rely on *Hazelwood*. In a footnote, it stated:

107. *Kincaid v. Gibson*, 236 F.3d 342, 356–57 (6th Cir. 2001) (en banc). *Kincaid* was widely discussed, largely favorably, after it was decided. For more on *Kincaid*, see, for example, Fiore, *supra* note 4, at 1932–46; Gregory C. Lisby, *Resolving the Hazelwood Conundrum: The First Amendment Rights of College Students in Kincaid v. Gibson and Beyond*, 7 COMM. L. & POL'Y 129, 145–54 (2002); Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 481–555 (2001).

108. *Kincaid*, 236 F.3d at 345. The officials objected to the theme, as well as the lack of captions under many photographs, the inclusion of stories about current events that did not involve the university, and the fact that the cover of the yearbook was purple even though the school's colors were gold and green. *Id.*

109. *Id.* at 347–54.

110. *Id.*

111. *See id.* at 352.

112. *Id.* at 354–55.

113. *Id.* at 355–56.

The parties essentially agree that *Hazelwood* applies only marginally to this case. [Appellants] argue that *Hazelwood* is factually inapposite to the case at hand; the KSU officials argue that the district court relied upon *Hazelwood* only for guidance in applying forum analysis to student publications. Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.¹¹⁴

In the same footnote, the court cited with approval the only other circuit court case to specifically discuss whether *Hazelwood* is applicable to college newspapers—the First Circuit’s decision in *Student Government Association v. Board of Trustees of the University of Massachusetts*.¹¹⁵ In that case, the court explicitly stated, “*Hazelwood* . . . is not applicable to college newspapers.”¹¹⁶

At least one other post-*Hazelwood* court has also found a college publication to be a public forum. In *Lueth v. St. Clair County Community College*, the court held that a college could not prohibit its student newspaper from publishing advertisements for a nude dancing club because the newspaper was a public forum.¹¹⁷ As in *Hazelwood*, the newspaper staff members received academic credit for their work on the newspaper; nonetheless, the court held that the newspaper was a “forum for public expression,” for three reasons.¹¹⁸ First, it was not operated in a “laboratory situation” like the *Hazelwood* newspaper. Second, the student editor-in-chief, not a faculty member, exercised control over the content of the

114. *Id.* at 346 n.5. Of course, this conclusion ignores the fact that *Hazelwood* actually requires a forum analysis and that finding that a publication is a limited public forum is perfectly consistent with *Hazelwood*. See Part IV.A, *infra*, for further discussion of this issue. Perhaps what the court meant to conclude was that it had no need to apply the “legitimate pedagogical concerns” standard.

115. *Kincaid*, 236 F.3d at 346 n.5. (citing *Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473 (1st Cir. 1989)).

116. *Student Gov’t Ass’n*, 868 F.2d at 480 n.6. This Note does not treat the *Student Government Association* case in any detail because it had only a tangential relationship to college newspapers, and it was barely related to student speech in general, making the court’s remark about *Hazelwood* seem gratuitous. The issue in *Student Government Association* was whether the university could rescind its recognition of an administrative unit that provided students with legal representation. *Id.* at 475. The court determined that no forum analysis was necessary, *id.* at 476–77, but briefly referenced, for some reason, the fact that *Hazelwood* was not applicable to college newspapers. *Id.* at 480 n.6.

117. *Lueth v. St. Clair County Cmty. Coll.*, 732 F. Supp. 1410, 1416 (E.D. Mich. 1990). The court added that any “regulation of commercial speech ‘must be designed carefully to achieve the State’s goal.’” *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980)).

118. *Id.* at 1415.

newspaper. Third, the newspaper solicited outside advertising and was distributed in the community as well as on campus.¹¹⁹

b. Curricular Speech Cases

In ruling against the colleges, the courts in *Kincaid* and *Lueth* emphasized that the student publications were not produced under close faculty supervision. By contrast, when speech occurs in the context of a specific course assignment, post-*Hazelwood* courts have been much more deferential to colleges' attempts to regulate speech, often based on an understanding of the classroom as a nonpublic forum.¹²⁰

So said the Tenth Circuit in *Axson-Flynn v. Johnson*.¹²¹ In *Axson-Flynn*, a university drama student sued the university after she felt compelled to leave when professors insisted that she use profanity and take God's name in vain during performances.¹²² She refused to do so because it would violate her religion.¹²³ The court held that the classroom was a nonpublic forum because the university had not opened it up for indiscriminate use by the student population.¹²⁴ It also held that *Hazelwood* was controlling precedent because the school was promoting, not merely tolerating, the classroom speech, as the performances were chosen by the school and incorporated into its curriculum.¹²⁵ It then found that there was a genuine issue of material fact as to whether the school had a legitimate pedagogical interest in regulating the student's speech.¹²⁶

The Ninth Circuit reached a similar conclusion in *Brown v. Li*.¹²⁷ In *Li*, a graduate student sued his university after administrators refused to

119. *Id.* at 1412–15. In finding that the newspaper was a public forum, the court also cited an operating policy that specifically delegated control over content to the editor-in-chief, although the case does not make it clear whether the college itself had signed off on that policy. *Id.* at 1415.

120. Note the emphasis on the *classroom* as a nonpublic forum; it is not necessarily true that courts in these cases would consider the whole school to be a nonpublic forum. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44–47 (1983) (holding specifically that faculty mailboxes within a school were nonpublic forums). It does not necessarily follow from *Perry* that the whole school is a nonpublic forum; indeed, such a holding would seem in tension with *Tinker*.

121. *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

122. *Id.* at 1281–83.

123. *Id.*

124. *Id.* at 1285.

125. *Id.* at 1285–86. See also *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding, based on *Hazelwood*, that a university could regulate the classroom speech of a professor because it had a legitimate interest in developing and preserving its own curriculum).

126. *Axson-Flynn*, 356 F.3d at 1293. The court noted that the school had proffered several reasons for requiring the student to use the profane language, including the need to preserve the integrity of the work, but also noted that the plaintiff might be able to make a case that these reasons were merely pretexts for an anti-Mormon sentiment. *Id.*

127. *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002).

grant him his master's degree because his thesis contained profanity in a "Disacknowledgments" section. Administrators claimed that the language violated their requirements.¹²⁸ Each of the three judges on the panel submitted a separate opinion, but two agreed that the university's action was constitutional. Like the court in *Axson-Flynn*, Judge Graber found that *Hazelwood* was the most appropriate standard for reviewing universities' regulations of curricular speech, largely because it preserved the university's interest in controlling its curriculum.¹²⁹ She concluded that the university had a "legitimate pedagogical objective" of teaching its students the proper professional standards for presenting research.¹³⁰ Concurring in the judgment, Judge Ferguson found that the university was justified in its refusal to award the degree because the student had added the objectionable material after the thesis was approved.¹³¹

Concurring in part and dissenting in part, Judge Reinhardt argued that the "marketplace of ideas" understanding of college campuses ought to be extended into the classroom.¹³² "Because college and graduate school students are typically more mature and independent, they have been afforded greater First Amendment rights than their high school counterparts, just as they have been afforded greater legal rights in general," he wrote.¹³³ Reinhardt then argued that the distinction between curricular and extracurricular speech was improper because the *Hazelwood* Court had said that the standard could apply in extracurricular settings as well.¹³⁴ He further argued that even if *Hazelwood* did apply, the university did not act reasonably in delaying the plaintiff's degree for a year, given the "minor" nature of the transgression, which he described as merely the violation of a formatting requirement.¹³⁵

128. *Id.* at 942–46. The objectionable material read: "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career," and then listed several college officials. *Id.* at 943.

129. *Id.* at 947–54.

130. *Id.* at 952.

131. *Id.* at 956 (Ferguson, J., concurring).

132. *Id.* at 960–62 (Reinhardt, J., concurring in part and dissenting in part).

133. *Id.* at 961.

134. *Id.* at 962–63.

135. *Id.* at 965. Reinhardt also argued that either of two analyses would be more appropriate. First, he said the court could consider the thesis to be a limited public forum. *Id.* at 964. Alternatively, it could apply an intermediate level of scrutiny to decisions by colleges and universities to regulate student speech. "Under an intermediate level of scrutiny, the university would have the burden of demonstrating that its regulation of college and graduate student speech was substantially related to an important pedagogical purpose," he wrote. *Id.*

Statutes increasing student speech rights on college campuses are very rare. Indeed, California appears to be the only state with a law specifically intended to protect the speech rights of students at public universities. The Leonard Law, passed in 1992, prohibits universities from disciplining students for speech that would be protected in public.¹³⁶

Such was the legal landscape on the issue of universities' freedom to regulate student speech in the summer of 2005. It was against this backdrop that the Seventh Circuit decided the case of *Hosty v. Carter*.

III. THE CASE OF *HOSTY V. CARTER*

A. FACTS OF *HOSTY*

The staff of the *Innovator*, the student newspaper at Governors State University, was hardly on friendly terms with the university administration. In an attempt to make the *Innovator* more hard-hitting and less "fluff and stuff," editors Margaret Hosty and Jeni Porche did not shy away from criticizing what they considered poor teaching and administrative leadership.¹³⁷

The *Innovator* was not fluff, but it was not good journalism either.¹³⁸ For example, when students complained about the conduct of the university's English department coordinator, the *Innovator* headline read, "Is Dr. Muhammad Failing Her Students? A Trinity of Dubious Service."¹³⁹ The article read, in part, "[t]he administration's willful ignorance of the deplorable state of affairs in the English department with Muhammad at the mast is reminiscent of the blind leading the blind, and some students have minds and futures too bright to allow them to become

136. CAL. EDUC. CODE § 66301 (West 2003). See also CAL. EDUC. CODE § 94367 (West 2002) (applying the same rule to private colleges and universities, except religious institutions to the extent that following the law would be inconsistent with those institutions' religious missions).

137. Jeffrey R. Young, *Censorship or Quality Control?: Lawsuit by Student-newspaper Editors Tests How Much Oversight Administrators Can Assert*, CHRON. HIGHER EDUC., Aug. 9, 2002, at A36, available at <http://chronicle.com/free/v48/i48/48a03601.htm>.

138. After an investigation, the Illinois College Press Association found that the *Innovator* had made several ethical errors. Letter from Jim Killam, President, Ill. Coll. Press Ass'n to Jeni S. Porche, Editor-in-Chief, *Innovator*, Margaret L. Hosty, Managing Editor, *Innovator*, Stuart Fagan, President, Governors State Univ., Patricia Carter, Dean of Student Affairs, Governors State Univ., Connie Zonka, Dir. of Pub. Affairs, Governors State Univ. (Mar. 2001), available at <http://collegefreedom.org/ICPA.htm>. Hosty wrote a detailed response to these criticisms. Letter from Margaret L. Hosty, Managing Editor, *Innovator*, and Jeni S. Porche, Editor-in-Chief, *Innovator*, to Jim Killam, President, Ill. Coll. Press Ass'n (Mar. 21, 2001), available at <http://collegefreedom.org/ICPAreply.htm>.

139. See M.L. Hosty, *Is Dr. Muhammad Failing Her Students? A Trinity of Dubious Service*, INNOVATOR, Oct. 31, 2000, at 1, available at <http://www.splc.org/pdf/innovator.pdf>.

entirely misled.”¹⁴⁰ Remarkably, that article was printed on the *Innovator*’s news pages, which are supposed to remain unbiased, not its editorial or op-ed pages, where writers are free to express opinions.

Around the same time, Hosty wrote articles attacking the integrity of the dean of the College of Arts and Sciences,¹⁴¹ and an article about the grievances of the *Innovator*’s adviser, who had recently been fired.¹⁴² The latter article “infuriated the administration,” the adviser said.¹⁴³

Meanwhile, administrators wrote open letters to the university community and accused the newspaper of “failing to meet ‘basic journalistic standards.’”¹⁴⁴ A letter from the university president accused the *Innovator* staff of playing “judge, jury, and executioner, without cause, with the wrong facts, and without due process.”¹⁴⁵ The paper refused to retract statements about the dean whose integrity had been attacked, or even publish letters from administrators about the issue.¹⁴⁶

In response, Patricia Carter, the university’s dean of student affairs and services, made a crucial series of phone calls. But she was not calling the staff of the *Innovator*. Rather, she was calling the commercial plant that printed the newspaper.¹⁴⁷

Her message: Stop the presses.

She demanded that the printer refuse to publish any future issues of the newspaper unless she had signed off on them.¹⁴⁸

Not surprisingly, her demand infuriated Hosty and Porche, who brought suit against the university. Their suit also named as defendants more than a dozen university officials, including Dean Carter.¹⁴⁹ The

140. See Young, *supra* note 137.

141. Hosty v. Carter, 412 F.3d 731, 732–33 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006). It is difficult to find information on the exact nature of the accusations against the dean.

142. M.L. Hosty, *De Laforcade’s Contract Dispute Reaches 3rd Phase Arbitration*, INNOVATOR, Oct. 31, 2000, at 1, available at <http://www.splc.org/pdf/innovator.pdf>.

143. See Student Press Law Ctr., *Editors File Lawsuit Against State University for Actions Designed to Paralyze Publication*, C. CENSORSHIP, Spring 2001, at 10, available at http://www.splc.org/report_detail.asp?id=661&edition=18.

144. *Id.*

145. Memorandum from Stuart Fagan, President, Governors State Univ., to Governors State Univ. Cmty. (Nov. 3, 2000), available at <http://collegefreedom.org/Fagan.htm>.

146. Hosty, 412 F.3d at 733.

147. *Id.*

148. *Id.*

149. Hosty v. Governors State Univ., 2001 U.S. Dist. LEXIS 18873, at *2–3 (N.D. Ill. Nov. 16, 2001). The other defendants included the university’s president and provost, several media board members, and even the mailroom supervisor. *Id.*

officials besides Carter were sued for a variety of other actions, some of which were connected to Carter's demand, and all of which the plaintiffs believed violated their First Amendment rights.¹⁵⁰

Before Dean Carter stopped publication of the *Innovator*, the paper had received funding from the university, which paid the cost of printing the paper.¹⁵¹ An advisory board, appointed in large part by the student government, selected the top student editors, but delegated to the editors control over the content of the publication.¹⁵² A faculty adviser also "normally" signed off on the newspaper before it went to press and offered the staff advice on journalistic standards and ethics, although it is not clear how much of the adviser's conduct was officially required and how much was simply dictated by custom.¹⁵³

The first ruling in Hosty and Porche's lawsuit came in the Northern District of Illinois in 2001. Without much discussion, the court granted summary judgment for all the named defendants except Carter, saying that many of them were not involved in actions that had anything to do with the plaintiffs' free speech rights, and that others were entitled to qualified immunity.¹⁵⁴ The court denied Dean Carter's claim of qualified immunity, however, citing cases such as *Antonelli v. Hammond* and *Stanley v. Magrath* for the proposition that colleges may not regulate the content of their student newspapers.¹⁵⁵

150. *Id.* at *3–18. The defendants were accused of conduct that included giving the staff computers that were technologically inadequate to publish a newspaper, destroying the newspaper's advertising forms, returning mail that contained inadequate postage or that was purely personal, failing to adequately investigate Dean Carter's phone calls, and removing one of the computers for security purposes. *Id.* at *3–10.

151. *Hosty*, 412 F.3d at 733.

152. *Id.* at 737.

153. *Hosty*, 2001 U.S. Dist. LEXIS 18873, at *3.

154. *Id.* at *13–18. A defendant who is also a public official is not entitled to qualified immunity from suit when the facts, taken in the light most favorable to the plaintiff, show that the official violated the plaintiff's constitutional rights, and when the right in question was clearly established. *Id.* at *14. That the appeal in *Hosty* dealt with whether Dean Carter was entitled to qualified immunity, as opposed to whether she actually violated Hosty's and Porche's constitutional rights, is an important issue in the en banc decision because it allowed the court to avoid directly dealing with whether the plaintiffs' rights were violated. See Part III.B, *infra*, for further discussion of this issue.

155. *Hosty*, 2001 U.S. Dist. LEXIS 18873, at *18–22. The court distinguished *Hazelwood*, saying that it did not apply to newspapers like the *Innovator*, which were published as extracurricular activities (as opposed to in-class projects), or to newspapers where student editors had control over content. *Id.* at *21 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). The court further noted that *Hazelwood* was also distinguishable because it involved a high school, as opposed to a university, as in *Hosty*. *Id.* at *21–22 (citing *Hazelwood*, 484 U.S. at 273 n.7).

Dean Carter appealed the denial to a panel of the Seventh Circuit. Because the appeal dealt with whether she was entitled to qualified immunity, the issues were whether her actions violated Hosty's and Porche's clearly established constitutional rights, and whether she should have been aware of those rights.¹⁵⁶ The panel upheld the district court, ruling that Carter should have known that her conduct clearly violated the plaintiffs' constitutional rights.¹⁵⁷

Dean Carter then petitioned the Seventh Circuit for an en banc rehearing on the issue of whether she was entitled to qualified immunity. Her petition was granted and, in June 2005, the court issued its decision.

B. THE SEVENTH CIRCUIT'S EN BANC DECISION

The first words in the en banc court's analysis of *Hosty* were perhaps its most controversial. "*Hazelwood* provides our starting point," wrote Judge Easterbrook for the majority.¹⁵⁸ It was the first time a circuit court refused to summarily dismiss *Hazelwood* as inapplicable in the context of collegiate extracurricular activities.¹⁵⁹ In fact, it was the beginning of a far more detailed analysis than had ever been done of whether *Hazelwood* was relevant in the context of a college newspaper. The court began this analysis by stating that *Hazelwood*'s footnote seven did not create an "on/off switch" with "high school papers reviewable, college papers not reviewable" by school administrators.¹⁶⁰ Rather, whether college papers were reviewable depended on whether they were public forums, and whether they were public forums did not depend exclusively on the students' ages.¹⁶¹ It cited to several Supreme Court decisions supporting

156. See *Hosty v. Carter*, 325 F.3d 945, 947 (7th Cir. 2003) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)), *rev'd en banc*, 412 F.3d 731 (7th Cir. 2005).

157. *Id.* at 947-49. The panel pointed to decisions such as *Bazaar* and *Kincaid* as cases in which courts rejected attempts by university administrators to stop the publication of student media. *Id.* at 947-48. Like the district court, it distinguished *Hazelwood*, saying "[t]reating these students like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step for us to take absent more direction from the Supreme Court." *Id.* at 949.

158. *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006). So upsetting were those words to Mike Hiestand, an attorney for the Student Press Law Center, that, in a column assailing the *Hosty* decision, he wrote, "I'm sure Abe Lincoln would be proud." Hiestand, *supra* note 6.

159. Remember that the Sixth and First Circuits, in *Kincaid* and *Student Government Association* respectively, quickly distinguished *Hazelwood* as inapplicable, with little to no discussion as to why they were doing so. See *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001); *Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989).

160. *Hosty*, 412 F.3d at 734.

161. *Id.*

the proposition that age does not control the public forum question, and that free speech questions decided at one academic level could be controlling at other academic levels.¹⁶² It concluded, therefore, that “*Hazelwood*’s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.”¹⁶³

Importantly, the court did not entirely discount the importance of age. Rather, it said that students’ ages could determine whether colleges have “legitimate pedagogical concerns” in restricting content based on the emotional maturity of the audience, as older students are mature enough to deal with content that younger students are not.¹⁶⁴ It also pointed out, however, that many college freshmen are younger than high school seniors, and that there is often little to no difference in the maturity levels of high school and college students.¹⁶⁵ The court also noted that for the purposes the *Hazelwood* opinion was trying to advance, which included promoting responsible journalism and protecting audiences from inappropriate material, there is no clear distinction between high school and college students.¹⁶⁶

Once the court established that *Hazelwood* provided the appropriate analytical framework, it then proceeded with the *Hazelwood* analysis, the first step of which was determining whether the *Innovator* was a public forum. The court began by rejecting the oft-applied conclusion that the Constitution draws a bright line between curricular activities, which are nonpublic forums, and extracurricular activities, which are public forums.¹⁶⁷ For example, if a university offered course credit to students who wrote stories for its alumni magazine, the magazine would be a nonpublic forum.¹⁶⁸ But if those students were paid rather than given course credit, the court argued, it would make little sense if the magazine suddenly had to be a public forum.¹⁶⁹ Thus, it held, “being part of the

162. *Id.* at 735 (citing, for example, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110 (2001) (holding that *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), which dealt with college students’ speech rights, was dispositive in a case involving the First Amendment rights of elementary school students)). See *supra* note 106 (discussing *Rosenberger*).

163. *Hosty*, 412 F.3d at 735.

164. *Id.* at 734 (internal quotations omitted) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)). See Part IV.B, *infra*, for a discussion of the proposition that age has no role in the public forum analysis, but may have a role in the “legitimate pedagogical concerns” analysis.

165. *Hosty*, 412 F.3d at 734.

166. *Id.* at 734–35.

167. *Id.* at 736.

168. *Id.*

169. *Id.*

curriculum may be a *sufficient* condition of a non-public forum, [but] it is not a *necessary* condition.”¹⁷⁰

Even though the *Innovator* was not automatically a public forum simply because it was extracurricular, the court nonetheless concluded that given the facts of this case, it was a limited public forum.¹⁷¹ Surely it was not a traditional public forum, the court wrote, because “[f]reedom of speech does not imply that someone else must pay.”¹⁷² But when the paper’s advisory board expressly delegated control over the *Innovator*’s content to the student editors, it created a limited public forum, at least when the facts were construed in the light most favorable to Hosty and Porche, the court held.¹⁷³ It wrote, “[o]n that understanding, the Board established the *Innovator* in a designated [limited] public forum, where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses.”¹⁷⁴ If a trial were to occur, however, the court said additional facts could be found to establish the *Innovator* as a nonpublic forum.¹⁷⁵

Because the issue in *Hosty* was whether Dean Carter was entitled to qualified immunity, the Seventh Circuit still had to ask whether a reasonable public official would have known that Dean Carter’s conduct was unlawful given the specific context of the case.¹⁷⁶ The court noted that other circuits had come to different conclusions about whether *Hazelwood* allowed university officials the same level of deference as high school officials to regulate the content of student speech using school-sponsored forums.¹⁷⁷ Given such uncertainty in the law, the court concluded that Dean Carter could not have known that she was acting outside her constitutional powers, and granted her request for qualified immunity.¹⁷⁸

170. *Id.*

171. *Id.* at 737–38.

172. *Id.* at 737. No court has ever held that a student newspaper is a traditional public forum, and the court in *Hosty* did not consider this possibility. This decision was clearly reasonable, as no newspaper, even one owned by the government, is open to unfettered speech. Every newspaper has editors who have control over what content they publish.

173. *Id.* at 737–38.

174. *Id.* at 738.

175. *Id.* at 737–38. For example, if the director of student life, to whom the advisory board was “responsible,” had established certain criteria for subsidizing publications, the *Innovator* was more likely to be a nonpublic forum. Similarly, the court suggested that if the faculty adviser exerted sufficient control over the *Innovator*’s content, it was more likely to be a nonpublic forum. *Id.*

176. *Id.* at 738.

177. *Id.* For example, it noted that *Axson-Flynn* (1st Cir.) and *Student Government Association* (10th Cir.) had reached opposite conclusions. *Id.* at 735, 738.

178. *Id.* at 738–39.

Judge Evans, who was also the author of the three-judge panel's decision, filed a dissent, joined by three other judges.¹⁷⁹ Evans began by rejecting the premise that there is no legal distinction between high school and college students, a premise he claimed was adopted by the majority.¹⁸⁰ He noted that cases such as *Healy* and *Widmar* had concluded that college students were entitled to greater First Amendment protection than high school students.¹⁸¹

Judge Evans also disagreed that Dean Carter was entitled to qualified immunity.¹⁸² He cited the long list of pre-*Hazelwood* cases in which courts rejected colleges' attempts to regulate the content of their student newspapers, and said "*Hazelwood* did not change this well-established rule."¹⁸³ He also maintained that cases like *Axson-Flynn* were too different to be applicable to *Hosty*, while cases like *Kincaid* were factually similar and should be considered clearly established law.¹⁸⁴ Moreover, Judge Evans said Dean Carter should have followed her university's own policy of leaving control over the *Innovator's* content in the hands of the students.¹⁸⁵

Hosty and Porche responded to the Seventh Circuit's ruling by petitioning the Supreme Court for certiorari. On February 21, 2006, the Court denied their petition, letting stand the Seventh Circuit's grant of immunity to Dean Carter.¹⁸⁶

179. *Id.* at 739–44 (Evans, J., dissenting).

180. *Id.* at 739. The majority, of course, did not actually adopt this premise. It merely said that age has no role in the *public forum* analysis, but that age could play a very important role in the "*legitimate pedagogical concerns*" analysis. *Id.* at 734 (majority opinion) (emphasis added).

181. *Id.* at 740–42 (Evans, J., dissenting). Evans discussed two reasons for the conclusion (reasons that have carried great weight through most of the Supreme Court's college speech cases): "high school students are less mature" than college students, and high schools and colleges have different missions. *Id.*

182. *Id.* at 742–44.

183. *Id.* at 743.

184. *Id.* at 743–44. Judge Evans made this argument even though the analysis in *Kincaid* was identical to the analysis in *Hosty* in every way except the explicit application of *Hazelwood*. In both cases, the court undertook a lengthy forum analysis before determining that the administrators' decisions to regulate the content of the publications were subject to strict scrutiny. As this Note will discuss below, the mere fact that the *Hosty* court did not expressly disavow *Hazelwood* makes no operational difference in most college publication cases. *See infra* Part IV.A.1.

185. *Hosty*, 412 F.3d at 744 (Evans, J., dissenting).

186. *Hosty v. Carter*, 126 S. Ct. 1330 (2006).

C. REACTION TO THE *HOSTY* DECISION

Although the en banc Seventh Circuit held that—on certain factual assumptions—the *Innovator* was a public forum and could therefore not be regulated, the college journalism community was outraged by the court's conclusion that a *Hazelwood* analysis could apply at all in a college newspaper context. Reaction to the decision was largely negative, although the tone of the criticism ranged from total condemnation to more measured concern.

The total condemnation crowd argued that the application of *Hazelwood* to colleges would effectively give administrators veto power over student speech, at least in school-sponsored mediums like student newspapers, and would create a chilling effect on student speech.¹⁸⁷ This group was led by the Student Press Law Center (“SPLC”), a nonprofit organization that provides representation to student journalists, and that advocates for expanded free speech rights in high schools and colleges.¹⁸⁸ Mark Goodman, the SPLC's executive director, said:

As the Supreme Court itself has noted (and the dissenting judges in this case pointed out), no where [sic] is free expression more important than on our college and university campuses where we hope to expose students to a true “marketplace of ideas.” . . . This Court has snubbed its nose at that notion.¹⁸⁹

Goodman also said he believed the decision opened wide the doors to censorship.¹⁹⁰ The *UCLA Daily Bruin* also argued that *Hosty* effectively ended the era of universities as “marketplace[s] of ideas,” saying “[t]he ramifications of this decision could topple the very foundations of a university's mission in the educational world.”¹⁹¹ Prior to *Hosty*, other commentators had made similar arguments, suggesting that applying or extending *Hazelwood* to colleges could create a chilling effect on student speech by effectively denying students the right to speak or learn about controversial topics.¹⁹²

187. Part IV of this Note will argue that this contention is largely irrational in light of the fact that *Hazelwood* analysis has long been applied in the school-sponsored student speech context in colleges. The applications have merely been implicit rather than explicit.

188. See Student Press Law Center, <http://www.splc.org/default.asp> (last visited Mar. 6, 2007).

189. Press Release, Student Press Law Ctr., Appeals Court Invites Havoc Says Student Press Law Ctr. (June 20, 2005), available at <http://www.splc.org/newsflash.asp?id=1034>.

190. *Id.*

191. Editorial, *Court Ruling Threatens University Free Speech*, DAILY BRUIN (UCLA), June 27, 2005, at 5, available at <http://dailybruin.com/news/articles.asp?ID=33844>.

192. See Fiore, *supra* note 4, at 1965–66. Unfortunately, the concerns of these commentators about “applying *Hazelwood*” in colleges seem oversimplistic, as discussed below. See *infra* Part IV.

The experts and student journalists who took a more measured tone in response to *Hosty* argued that the ruling would have limited effects because most college newspapers would be considered public forums.¹⁹³ James Tidwell, acting chair of the journalism department at Eastern Illinois University, said “I’m guessing a vast majority of college newspapers would be found to be public forums, so I don’t see [the case] as having a great negative impact.”¹⁹⁴ Even Goodman, who had some of the harshest words for *Hosty*, acknowledged “[a]s a practical matter, most college student newspapers are going to be considered designated public forums and entitled to the strongest First Amendment protection because that’s the way they’ve been operating for decades.”¹⁹⁵

Among legal commentators, the reaction to *Hosty* has been almost uniformly negative, with most commentators leaning toward the total condemnation side.¹⁹⁶ Like Judge Evans’s dissent, the commentators generally condemn what they perceive as *Hosty*’s refusal to acknowledge any distinctions between high school and college students.¹⁹⁷

193. For a more detailed discussion of this assertion, see Part IV.A.2, *infra*.

194. Rebecca McNulty, *Student Media Experts React to Governors State University Ruling*, STUDENT PRESS LAW CTR. (June 22, 2005), <http://www.splc.org/newsflash.asp?id=1039>.

195. Press Release, *supra* note 189.

196. See, e.g., Daniel A. Applegate, Note, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. L. REV. 247, 271–79 (2005) (arguing that “extending *Hazelwood*” to college newspapers does not properly recognize that colleges are the “marketplace of ideas,” and that college newspapers should be considered public forums); Michael O. Finnigan, Jr., Comment and Casenote, *Extra! Extra! Read All About It! Censorship at State Universities: Hosty v. Carter*, 74 U. CIN. L. REV. 1477, 1489–96 (2006) (arguing, among other things, that *Hosty* misapplied *Hazelwood* and ignored the distinctions between high school and college students); Jessica B. Lyons, Note, *Defining Freedom of the College Press After Hosty v. Carter*, 59 VAND. L. REV. 1771, 1792–94, 1804–07 (2006) (arguing that *Hosty* erred in finding no distinction between high school and college newspapers; also arguing that all college newspapers should be presumed public forums, and when that presumption is rebutted, only viewpoint-neutral restrictions should be permitted); Virginia J. Nimick, Note and Comment, *Schoolhouse Rocked: Hosty v. Carter and the Case Against Hazelwood*, 14 J.L. & POL’Y 941, 982–96 (2006) (arguing that *Hosty* overlooked the distinctions between high school and college students, as well as the differences in the respective missions of high schools and colleges; also arguing that public forum analysis is improper in the college publication context and that *Hosty* will chill speech by college journalists). *But see* Recent Case, *First Amendment—Prior Restraint—Seventh Circuit Holds that College Administrators Can Censor Student Newspapers Operated as Nonpublic Fora.—Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (*en banc*), 119 HARV. L. REV. 915, 919–22 (2006) (arguing that *Hosty* will not give colleges wide latitude to censor student newspapers because most will be considered public forums, and because colleges will probably not be permitted to transform limited public forums into nonpublic forums merely because they dislike the content of the forum).

197. These commentators are generally guilty of the same mistake Judge Evans made in his dissent. They overlook the fact that *Hosty*’s analysis *does* specifically account for the differences between high school and college students, just not in the forum analysis. See *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (*en banc*), *cert. denied*, 126 S. Ct. 1330 (2006). Rather, it considers them in the

IV. IMPLICATIONS OF *HOSTY*

Although “*Hazelwood* provides our starting point”¹⁹⁸ was only the beginning of the Seventh Circuit’s analysis, *Hosty*’s harshest critics seem to read the case as though it were the end point. They seem to believe that *Hazelwood* dictates that administrators must win and students must lose and, in the process, the “marketplace of ideas” is ransacked.¹⁹⁹ In their minds, this end result is the meaning of applying or extending *Hazelwood* to colleges. The reality is far different, and far less pernicious. *Hazelwood* does not dictate a result, and its application does not automatically trample on anything. Applying or extending *Hazelwood* merely means applying a particular analytical framework in cases involving administrative control over the content of school-sponsored student speech. That framework allows administrators to regulate such speech only when two conditions are met. The first is that the newspaper is a nonpublic forum. Newspapers that are limited public forums will not even be subject to the “legitimate pedagogical concerns” test, but rather will be protected by the much less deferential strict scrutiny test.²⁰⁰ The second condition is that the administration’s action be “reasonably related” to a “legitimate pedagogical concern.” Only where the forum is nonpublic and the action meets the “legitimate pedagogical concern” standard can the action be upheld.

In light of *Hosty*, then, it makes sense to address how the application of *Hazelwood*’s framework in the context of school-sponsored student speech in colleges would affect college students’ rights. There are two principal issues.²⁰¹ The first is how, if at all, the application of a forum analysis under *Hazelwood* alters the analytical structure typically used in college student speech cases, and what types of college publications are public forums in light of *Hosty*. The second is, in those newspapers that are

“legitimate pedagogical concerns” analysis, a conclusion that seems logically correct in light of the Supreme Court’s public forum jurisprudence and the *Hazelwood* decision itself. See Part IV, *infra*, for further development of this argument. Also, these commentators make virtually no acknowledgment that different college publications operate under wildly different sets of circumstances that may lend themselves to different results under a forum analysis. For example, many student newspapers in colleges are produced in classrooms under the close supervision of a faculty member. For a discussion of why such newspapers are properly considered nonpublic forums, see Part IV.A.2, *infra*; for an argument about what standard of review is appropriate in such cases, see Part V, *infra*.

198. *Hosty*, 412 F.3d at 734.

199. See, e.g., Fiore, *supra* note 4, at 1918–30; Press Release, *supra* note 189.

200. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

201. A less important issue is whether a particular official is entitled to qualified immunity despite violating a student’s constitutional rights. See Part IV.A.3, *infra*, for a brief discussion of this issue.

nonpublic forums, what actions are “reasonably related to legitimate pedagogical concerns”?

A. PUBLIC FORUM ANALYSIS IN LIGHT OF *HOSTY*

1. Does Applying a Forum Analysis Change Students’ Rights?

The first step in *Hazelwood*’s analytical framework is a forum analysis, so when cases like *Hosty* apply *Hazelwood* to colleges, it is worth asking whether conducting a forum analysis would alter the current framework for analyzing school-sponsored student speech cases in colleges. A look back at the federal courts’ history of dealing with these cases demonstrates that it would not, because the courts have been subjecting these cases to explicit forum analysis since at least as far back as *Widmar* a quarter-century ago. And in reality, the Supreme Court itself has been conducting forum analysis in all types of student speech cases, whether or not the speech was school-sponsored, since *Tinker*. There it developed the “material and substantial disruption” standard of review in light of the particular characteristics of the school setting—a type of inquiry that forms the most critical aspect of the public forum doctrine.²⁰² Furthermore, because the pre-*Hazelwood* college publication cases like *Antonelli* applied *Tinker*’s “material and substantial” disruption standard, the forum analysis was built into those decisions as well, even though the cases did not explicitly say so.²⁰³

Even if one were to make the implausible argument that *Tinker* and the early college newspaper cases cannot be read as forum analysis, there is no doubt that in the twenty-five years since *Widmar*, forum analysis has been applied repeatedly when universities have attempted to regulate student speech in school-sponsored forums. As evidenced by cases such as *Widmar* at the Supreme Court level, *Axson-Flynn* at the circuit court level, and *Lueth* at the district court level, these analyses are common enough that anybody dealing with a case about school-sponsored student speech on a college campus would simply expect the public forum question to be at

202. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). For a discussion of why *Tinker* may be read as conducting a forum analysis, see *supra* note 33 and accompanying text.

203. For a discussion of how *Antonelli* and other cases may also be read as conducting a forum analysis, see *supra* note 102 and accompanying text.

issue.²⁰⁴ Forum analysis is the most logical way to evaluate such cases and, with or without *Hazelwood*, would almost certainly be used.²⁰⁵

A comparison between *Kincaid* and *Hosty* illustrates this point. In one breath in *Kincaid*, the Sixth Circuit refused to apply *Hazelwood*.²⁰⁶ In another, it did exactly what *Hazelwood* would have required it to do—a forum analysis, and a lengthy one at that.²⁰⁷ In effect, it did “apply *Hazelwood*,” even though it said it did not. If it had explicitly applied *Hazelwood*, *Kincaid* would have come out the same, and with the same analytical structure.²⁰⁸ Similarly, if the Seventh Circuit in *Hosty* had not explicitly “applied *Hazelwood*,” it almost certainly still would have undertaken the same type of forum analysis undertaken in *Kincaid* and the other college speech cases. *Hazelwood*’s explicit application simply has no effect on whether a forum analysis is undertaken.

Thus, with forum analysis still required, it remains an important question which student publications are limited public forums and which are nonpublic forums.

2. Determining Which Publications Are Public Forums

This step of the *Hazelwood* analysis is in many ways the most daunting. Though it is unclear precisely how many college publications are in existence across the United States, the number certainly exceeds 1000,²⁰⁹ and each operates under its own set of circumstances. As the

204. For a discussion of these cases, see Part II.C, *supra*. But see *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002) (holding that *Hazelwood* applies, but not explicitly applying a forum analysis).

205. Not everyone agrees that forum analysis would be used without *Hazelwood*. See Brief Amici Curiae of Student Press Law Center et al. in Support of Plaintiffs-Appellees at 23–26, *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003) (No. 01-4155) (arguing that public forum analysis ought to be inapplicable to college newspapers because they are typically editorially independent from the school, and noting that forum analysis was not explicitly conducted in many early college newspaper cases). Given that no alternative analytical structure has ever been proposed, however, it seems more logical to conclude that public forum analysis is appropriate. That many publications are independent means that *those publications* should be considered public forums, not that a forum analysis is inappropriate.

206. See *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc).

207. See *id.* at 347–54.

208. Granted, the *Kincaid* court did not apply the “legitimate pedagogical concerns” standard when arguing that even if the yearbook was a nonpublic forum, the administration’s content was unreasonable; it instead applied the default “reasonableness” standard used in most nonpublic forum cases. See *id.* at 355. This analysis was dictum, however, and anyway, it is not clear how different a “reasonableness” standard really is from the “legitimate pedagogical concerns” standard in a college context.

209. As of early March, 2007, nearly 1100 college newspapers were members of the Associated Collegiate Press (“ACP”), an organization that sponsors conventions and contests for college publications. Associated Collegiate Press, <http://www.studentpress.org/acp> (last visited Mar. 6, 2007) (follow “Advanced Search” in the “Join Now” box; then follow “Newspaper”; then follow “Search”). A

Kincaid and *Hosty* courts demonstrate, the public forum inquiry is highly fact-specific, and any attempts to apply it generally will necessarily be imprecise. Imprecise, though, does not mean useless, and it does appear possible to apply forum analysis to the most common organizational arrangements of publications.

Whether a publication is a public forum will depend on the degree of control over the publication's content that the college administration has delegated to students.²¹⁰ To determine the degree of control, courts will examine whether there is either an explicit policy turning editorial control over to the students or a practice of administrative acquiescence to students' decisions.²¹¹ Courts will also examine whether the faculty adviser exercises control over the newspaper's content, whether the adviser is paid with university funds, and whether the publication exists as part of a journalism or other class curriculum.²¹²

Most college publications appear to use one of four different organizational arrangements, and the forum analysis will be different for each. Under the first arrangement, the publication is produced in a classroom for course credit, and a faculty adviser exercises close control over decisions about the publication's content.²¹³ Under the second arrangement, the publication is produced for course credit, but the faculty adviser exerts no or virtually no control over content. Under the third, the publication is produced outside the curriculum, but still has administrative

similar search is possible for yearbooks, many of which are also ACP members. It is noteworthy, however, that many ACP members are housed at private colleges.

210. Recall that the degree of control delegated by the government is the essential inquiry in all public forum cases, given that the definition of a limited public forum is a forum that government has specifically opened for general use, or at least use by a particular population. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

211. These factors played an important role in the few college speech cases that dealt with the public forum issue. See *Kincaid*, 236 F.3d at 347–54; *Lueth v. St. Clair County Cmty. Coll.*, 732 F. Supp. 1410, 1412–15 (E.D. Mich. 1990) (discussed *supra* Part II.C.2.a).

212. The *Hosty* court suggested that whether a publication is curricular is a critically important factor, stating, “[t]hus although, as in *Hazelwood*, being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition.” *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006). As this Section will demonstrate, however, this statement oversimplifies the issue because it is possible for a school to delegate control over a publication's content to students but still allow them to receive course credit for their work on the publication. The statement in *Hosty*, then, is probably best understood as a mere dictum, especially because the newspaper at issue in *Hosty* was not curricular. It is probably more accurate, and more consistent with Supreme Court precedent, to conclude that whether a publication is curricular is merely a factor to consider in determining whether a college intended to retain control over its content.

213. For example, the University of Arizona offers journalism classes that produce local newspapers for the towns of South Tucson, Arizona, and Tombstone, Arizona. University of Arizona Department of Journalism, <http://journalism.arizona.edu/curriculum.php> (last visited Mar. 6, 2007).

ties to the university, such as a faculty adviser or support staff paid from university funds.²¹⁴ Under the fourth, the publication has little or no administrative connection to the university. This category includes newspapers that are incorporated as their own separate entities.²¹⁵ It also includes those that do not rely financially on the university, pay rent to the university for office space, and pay student and professional staff with nonuniversity money.²¹⁶

For two of these four arrangements, the analysis is easy. Where the publication is produced for course credit, under the close supervision of an adviser who can exercise control over content, it is essentially an example of *Hazelwood's* facts in the college context, and is a nonpublic forum.²¹⁷ At the extreme opposite are publications that have no or only a minimal administrative connection to the university. These publications are public forums. In fact, a powerful argument exists in many of these cases that a forum analysis should not apply at all because these publications do not use university money and are perhaps not even arms of government. Such an argument is most persuasive for those publications that are separate corporations.²¹⁸

A slightly more difficult case is that of publications that are produced for course credit, but not subject to faculty control over content, either by

214. This third arrangement appears to be fairly common. According to a 1997 study, only one out of 101 college newspapers surveyed identified itself as strongly curriculum-based. See John V. Bodle, *The Instructional Independence of Daily Student Newspapers*, JOURNALISM & MASS COMM. EDUCATOR, Winter 1997, at 16, 24. It is important, however, not to overstate the significance of this survey. As indicated in note 209, *supra*, more than 1000 college newspapers exist in the United States. Given that this survey focused on daily newspapers, which are most likely to be large and independent, it is likely that many of the 900-plus newspapers that were not surveyed are small and more closely controlled by the university. Such newspapers are more likely to be designated nonpublic forums than large, daily newspapers, and given their reliance on the colleges, many people might consider that designation perfectly reasonable.

215. College newspapers that have incorporated include the *Harvard Crimson* and the *Minnesota Daily* (University of Minnesota, Twin Cities). See About the Daily, MINN. DAILY, <http://www.mndaily.com/aboutus.php> (last visited Mar. 6, 2007); About the Harvard Crimson, HARVARD CRIMSON, <http://www.thecrimson.com/info/about.aspx> (last visited Mar. 6, 2007). Note that the *Minnesota Daily* is the same newspaper that was at issue in *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983), which dealt with how the newspaper received funding from the university. After that case, the newspaper incorporated. For more on *Magrath*, see *supra* note 103 and accompanying text.

216. Such an arrangement seems common at large universities where the student publication has not incorporated. See, e.g., About the Indiana Daily Student, IND. DAILY STUDENT, <http://www.idsnews.com/news/about/> (last visited Mar. 6, 2007).

217. Part V of this Note deals with whether colleges should have the same degree of authority as high schools to restrict the content of student speech in this context.

218. As noted in Part II.A, *supra*, public forum analysis is conducted only when the property or medium is government-run. Where it is privately owned, a forum analysis makes no sense because the government can claim no authority whatsoever over the speech.

policy or longstanding practice.²¹⁹ Such an arrangement is uncommon, but not unheard of. Perhaps the most prominent example is the *Lantern*, the student daily newspaper at Ohio State University.²²⁰ Each semester, as many as thirty students may sign up for a five-unit course in the communications department that offers credit for working as a reporter.²²¹ By long-standing practice, the *Lantern*'s faculty adviser, who is also formally the instructor of the communications course, does not make decisions about the content of the paper; she does, however, grade the stories that reporters write.²²² The only situations in which the adviser may overrule an editor's decision are when libel or invasion of privacy issues arise. As of early 2006, a *Lantern* adviser and editor have not disagreed about whether an article should run for at least fifteen years.²²³ The newspaper's mission statement, which was adopted by the university's Student Publications Committee, also emphasizes that the newspaper is intended to give the university community a forum for "freedom of expression."²²⁴

At first blush, it is tempting to believe that courts would consider publications like the *Lantern* to be nonpublic forums. In some ways, this conclusion is consistent with *Hazelwood* as, in both situations, the newspapers are produced in a classroom. It might also appear consistent with *Axson-Flynn*, where the classroom itself was ruled a nonpublic forum. To find that publications like the *Lantern* are nonpublic forums strictly on this basis, however, would contradict the Supreme Court's rule that whether a forum is public depends on the government's intent, as demonstrated through its policy and practice. In these cases, it simply seems unreasonable to suggest that a university's long-standing practice of granting student editors the final authority over content decisions reflects

219. These are the publications for which *Hosty*'s analysis about necessary and sufficient conditions falls short. For more on this issue, see *supra* note 212.

220. See Everything You Ever Wanted to Know About . . . the Lantern, LANTERN (Ohio State Univ.), <http://www.thelantern.com/about/> (last visited Mar. 6, 2007) [hereinafter About the *Lantern*] (noting that the *Lantern* is the "third-largest college newspaper in the country").

221. FAQs: Writing for the Lantern, LANTERN (Ohio State Univ.), <http://www.thelantern.com/faq/> (last visited Mar. 6, 2007).

222. E-mail from Ray Catalino, Business Manager, *Lantern*, to author (Feb. 20, 2006, 5:51 a.m. PST) (on file with author).

223. *Id.*

224. *Id.* The entire mission statement reads as follows:

The official mission of *The Lantern* is to help train and give experience to students preparing for careers as independent and responsible journalists, to provide a source of news, opinion and advertising about and for the university community and to offer that community a forum for the exercise of its freedom of expression.

About the *Lantern*, *supra* note 220.

anything except a clear intent to create a limited public forum. This was also the holding of the court in the *Lueth* case, where a curricular newspaper was a public forum because the editors, not the faculty, exercised control over content.²²⁵ That publications like the *Lantern* are public forums seems especially likely given that the newspaper's mission statement emphasizes "freedom of expression."²²⁶

The fourth and final type of college publication is the most difficult to analyze because it is not always clear whether it is a public forum or nonpublic forum. This type includes publications that are extracurricular, but that have close administrative ties to the university, such as a faculty adviser or support staff paid from university funds. This was the factual scenario in both *Kincaid* and *Hosty*, so the analyses applied by those courts are instructive. In both cases, the fact that the universities followed the practice of turning over editorial control to students was a major factor in finding the publications to be public forums; in fact, in *Kincaid*, a formal policy existed giving students such control.²²⁷

Aside from whether a formal policy exists, perhaps the most important factor in determining whether these publications are public forums is the degree of involvement of the publication's faculty adviser. If the adviser exercises no control over content, but rather leaves decisions to student editors, the publication is more likely a public forum. On the other hand, where the adviser constantly overrules student editors, or insists on reading content before it is published, those are powerful indicators that the publication is a nonpublic forum. For example, in *Axson-Flynn*, the fact that students were required to complete a series of tasks under the close supervision of a faculty member contributed strongly to the conclusion that the classroom was a nonpublic forum.²²⁸ Aside from policies and practices, the fact that the dispute is taking place over a publication on a university campus, where ideas are supposed to be exchanged freely, would probably also make a court more likely to find a publication to be a public forum.²²⁹

225. *Lueth v. St. Clair County Cmty. Coll.*, 732 F. Supp. 1410, 1415–16 (E.D. Mich. 1990). See also *supra* Part II.C.2.a.

226. See *Draudt v. Wooster City Sch. Dist. Bd. of Educ.*, 246 F. Supp. 2d 820, 828–29 (N.D. Ohio 2003) (finding the school board's statement about providing "vehicles for the expression of student thought and action" through school-sponsored publications was evidence of the board's intent to create a limited public forum (emphasis omitted) (quoting the school's Board Policy 5722)). For more discussion of *Draudt*, see *supra* note 77 and accompanying text.

227. *Hosty v. Carter*, 412 F.3d 731, 736–38 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006); *Kincaid v. Gibson*, 236 F.3d 342, 347–54 (6th Cir. 2001) (en banc).

228. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004).

229. Perhaps surprisingly, in the context of extracurricular publications, one factor that appears unlikely to play much of a role in the analysis is whether the newspaper receives funding from the

3. The Reality About Chilling Effects

Many of *Hosty*'s critics have argued that *Hazelwood*'s extension to college campuses would chill student speech. They rarely bother to explain what this buzzword means, but they apparently fear that if *Hazelwood* is applied to colleges, students will be stopped, either by administrators' preemptive action or by their own fears of postpublication retaliation, from printing material they would print if *Hazelwood* were inapplicable. In certain contexts, these are realistic concerns. But in other contexts, they are irrational.

The concerns are irrational in the case of publications that are obviously public forums. In such cases, the student editors and staff have little reason to feel a chill; the law will protect them if administrators take adverse action because of what they printed. Publications that are obviously public forums include those that are incorporated and those that operate outside the curriculum, under a clear policy or practice of giving students absolute authority over what gets published.²³⁰ The likelihood that these publications are not public forums is so slight that any fear that retaliation against them would be upheld is so remote as to border on irrational. Furthermore, *Hazelwood*'s application to colleges does not make it any less likely that these publications are public forums, as *Hazelwood* itself does nothing to alter the forum analysis. Similarly, where publications are clearly nonpublic forums, *Hazelwood*'s application should not create a chill

university. As far back as *Magrath* in 1983, and as recently as *Kincaid* and *Hosty*, courts have been concluding that where universities fund student publications, and then suddenly withdraw funding or make it more difficult for the publications to access that funding, they are not exercising their rights to control a nonpublic forum, but rather impermissibly closing off a public forum. See *Hosty*, 412 F.3d at 737-38; *Kincaid*, 236 F.3d at 347-54; *Stanley v. Magrath*, 719 F.2d 279, 282-84 (8th Cir. 1983) (holding that the university's board of regents could not alter the fee structure that funded the student newspaper because it objected to the newspaper's content).

230. Nonetheless, students working for these publications might be chilled by fear that the school could shut down their forum entirely, or somehow change the public forum into a nonpublic forum. Some Supreme Court precedent suggests this is possible. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (noting that the government is not required to keep limited public forums open for an unlimited time). Such an argument, however, has never persuaded a court in the context of content restrictions on a college publication, even though it was available in cases like *Kincaid* and *Hosty*. Furthermore, given that, as noted above, courts typically allow the government to close limited public forums only for reasons that are content- or viewpoint-neutral, this argument seems unlikely to work. See *supra* note 19. After all, the most pernicious attempts by colleges to restrict the content of student publications come in response to content that administrators do not like, and often, because they specifically reject the viewpoint of the articles. Regardless of the merits of these arguments, though, *Hosty* had no effect on the likelihood of their success because before *Hosty*, forum analysis was already the standard means of evaluating administrative attempts to restrict content of student publications.

because the publications would already be operating in situations where faculty or administrators controlled content. If students at these publications felt a chill, it would not be because of *Hazelwood's* application; it would be because their speech has always been chilled or because they misread *Hosty*.

Of course, some overzealous administrator might still attempt to stop the presses on publications that clearly or probably are public forums, despite knowing the action is unconstitutional. This possibility may chill some speech, even though the law is squarely on the students' side. Unfortunately, no legal remedies can completely eliminate these situations, just as there is no legal remedy in the non-First Amendment world that can prevent all individuals from acting unconstitutionally.²³¹ Still, students have two additional protections. First, in many cases, administrators may not be able to claim qualified immunity. In fact, *Hosty* itself makes it more difficult for administrators to claim qualified immunity because the decision has put colleges on notice that people in Dean Carter's position *do not* have the power to stop the publication of newspapers like the *Innovator*.²³² Still, qualified immunity will likely protect administrators in many cases, meaning some students will simply have to seek injunctions.

Fortunately for them, qualified immunity does not bar the granting of injunctions.²³³ Students' second protection against a claimed chilling effect is thus that even where overzealous administrators do improperly restrict their speech, the students will still eventually be able to get injunctions against unconstitutional conduct—even if the administrator is personally protected. Thus, the unconstitutional actions will not be allowed to stand for all time.

The concerns about a chill are the most rational in situations where genuine uncertainty exists about whether a publication actually is a public forum. In the wake of *Hosty*, reasonable administrators at these schools might believe they are protected by the deference of the "legitimate pedagogical concerns" test, but a court might actually find that they are

231. As an obvious example, even though murderers may go to jail for life, or even face the death penalty, some people still murder.

232. In other words, Dean Carter was entitled to qualified immunity because she decided to restrict the *Innovator's* content when the law was still unclear. *Hosty*, 412 F.3d at 738–39. But now that the *Hosty* court has ruled that she probably did violate the plaintiffs' constitutional rights, future administrators in similar situations might not be so entitled.

233. See *African Trade & Info. Ctr. v. Abromaitis*, 294 F.3d 355, 360 (2d Cir. 2002) (stating that qualified immunity is not a defense when plaintiffs seek injunctive relief); *Newman v. Burgin*, 930 F.2d 955, 957 (1st Cir. 1991) (Breyer, J.). See also *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (discussing the applicability of qualified immunity specifically where damages are sought).

not.²³⁴ Given the possibility that the “legitimate pedagogical concerns” test might apply to these publications, their editors might pull punches, especially against the school’s administration, out of fear that a court might uphold retaliation against them, or even out of fear that overzealous administrators will misinterpret the law. Unlike in many other contexts, fear of a “chill” seems likely here, but it also seems inappropriate in a nation that values freedom of expression. Part V of this Note will suggest a constitutional test that attempts to allay these concerns even in publications that are nonpublic forums, balancing students’ freedom of speech against the need for colleges to control their curriculums.²³⁵

But before making this normative conclusion, this Note will address how courts might interpret “legitimate pedagogical concerns” in college publications that are not public forums.

B. “LEGITIMATE PEDAGOGICAL CONCERNS” IN LIGHT OF *HOSTY*

Under *Hazelwood*, once a court rules that a student publication is a public forum, it may uphold a school’s attempt to regulate content only if the school’s justification for doing so passes strict scrutiny—and it rarely will. Because most college publications are probably public forums, this will be the analytical framework applied most frequently. But in a post-*Hosty* world, when a publication is not a public forum, the court will ask whether the administration’s conduct is “reasonably related to legitimate pedagogical concerns.”²³⁶ No court has ever ruled on the operational meaning of this standard in the college context, so any prediction of how this standard would be applied is fraught with uncertainty. Indeed, much of the concern underlying the *Hosty* decision focused on the possibility that the standard would be applied to give schools as much power as they have been given in cases like *Hazelwood*. This is possible. But the language of *Hazelwood* itself, as well as the whole of the Supreme Court’s student speech jurisprudence, makes it far more likely that while courts would probably still leave room for administrators to regulate publications’ content, they would likely also require them to defer to the emotional maturity of college students wishing to confront sensitive topics.

234. This class of publications might include newspapers that have an occasional practice of having an adviser overrule a student editor, or a policy giving administrators the right to review content or fire student editors.

235. The adoption of this test would do a great deal to allay any chill felt by students whose publication may or may not be a public forum because, under this test, the protected speech could not be restricted in either type of forum. *See infra* Part V.

236. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Hazelwood emphasizes the need for schools to “take into account the emotional maturity of the intended audience” when determining whether to stop a student newspaper from publishing stories on controversial topics.²³⁷ Such topics “might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”²³⁸ By drawing a distinction between topics that would be controversial in high schools and those that would be controversial in elementary schools, *Hazelwood* acknowledges that “legitimate pedagogical concerns” is a standard that gives schools less power as students grow older. Under *Hazelwood*, an article arguing that there is no Santa Claus would presumably be appropriate in a high school newspaper. This interpretation of *Hazelwood* is consistent with *Hosty*, which found merely that “age does not control the *public-forum* question,”²³⁹ and indeed noted that “[t]o the extent that the justification for editorial control depends on the audience’s maturity, the difference between high school and university students may be important.”²⁴⁰

Courts applying *Hazelwood*’s test in colleges would seem to be bound by the same idea that administrators’ power contracts as students get older. College students are older and more mature than high school students, so courts would presumably be even less tolerant of colleges attempting to regulate the content of their student publications than they are of high schools. This seems especially likely given that the vast majority of college students are at least eighteen years old, and therefore legal adults who are permitted to access pornography, vote on controversial topics in elections, and serve in the military, perhaps even in wars they personally oppose. That colleges have a “legitimate” concern in shielding them from material dealing with these very topics seems unlikely, and a court might simply hold they have no legitimate interest in protecting students from discussions of any controversial issues.

If emotional maturity of the students was the only “legitimate pedagogical concern” identified by the Supreme Court in *Hazelwood*, most (if not all) of the concerns that are legitimate in the high school context would be illegitimate in the college context. But the Court discussed a litany of other concerns that are legitimate in the high school context, many

237. *Id.* at 272.

238. *Id.*

239. See *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006) (emphasis added).

240. *Id.* at 734.

of which were not dependent on the age of the students.²⁴¹ For example, *Hazelwood* permits high schools to regulate the content of student newspapers where the speech is ungrammatical. And if a high school is justified in reviewing the content of its student newspaper to eliminate bad grammar, there is reason to believe colleges would be justified in doing the same thing for the same reasons. Bad grammar is bad grammar; subject-verb disagreement and dangling modifiers do not become more permissible as students grow older (if anything, they become less excusable). Many college journalists may reasonably be concerned that colleges would be permitted to base all sorts of attempts to regulate content on such minor problems as bad grammar.

A different reading of *Hazelwood*'s text suggests, though, that students have less to fear than they think, and that the entire "legitimate pedagogical concerns" test is actually age-specific. The Court justified giving such broad latitude to high school administrators by saying that doing so was necessary for "fulfilling [schools'] role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'"²⁴² That is, the latitude was necessary to fulfill high schools' missions. The language of the Supreme Court in other cases suggests that colleges have dramatically different missions; rather than protecting students from controversial ideas, *Healy* and other cases suggest that colleges have a distinctly important role in protecting students' freedom to exchange ideas about whatever topic they choose.²⁴³ Thus, courts might conclude that the reasons for applying the "legitimate pedagogical concerns" standard are undermined in colleges and, as a result, the standard itself should be inapplicable.

But such an approach seems rather extreme, and comes very close to the logical boundaries of *Hazelwood*. Courts seem more likely to conclude that even though colleges may not have the same concerns as high schools in protecting students from controversial ideas, their function as educational institutions still permits them to regulate especially egregious student speech for reasons other than emotional maturity of the audience, even if that speech would be protected in the professional press. This is an

241. See *Hazelwood*, 484 U.S. at 271–72.

242. *Id.* at 272 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). See also Hafén & Hafén, *supra* note 70, 379–419 (arguing that *Hazelwood* actually helps prepare students to participate in democracy by ensuring they are taught basic skills and values needed to function properly in society).

243. See, e.g., *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972); *supra* Part II.C.1.

understanding of school-sponsored college publications as a sort of free-speech stepping stone between high schools and the professional world. Behind this conclusion is the idea that when a college reserves a publication as a nonpublic forum, it is attempting to teach many of the same lessons about how to responsibly exercise free speech that are taught in high school, but the power to teach those lessons must be balanced against students' more expansive freedom to explore ideas for themselves, with less stringent supervision from their instructors.

Regardless of how courts may eventually read the meaning of "legitimate pedagogical concerns," there is no doubt that the meaning of the phrase is unclear within the college context. Part V of this Note will switch into a normative mode and suggest a means for clearing up this confusion.

V. A STANDARD FOR COLLEGE STUDENT SPEECH IN NONPUBLIC FORUMS

The debate over how to define "legitimate pedagogical concerns" in colleges boils down to the same question that the Supreme Court has been dealing with since it first handed down *Tinker* more than thirty-five years ago: at what point must students' speech rights yield to the schools' need to fulfill their educational purposes? The "legitimate pedagogical concerns" test defines that point. When schools have a "legitimate pedagogical concern," they may stop student speech to fulfill their educational purposes, at least when the speech occurs in a nonpublic forum. When they have no such purpose, they may not stop speech, even in a nonpublic forum.

In *Hazelwood*, the Supreme Court was right to decide that the test should most often favor high schools. It was right because schools ought to be able to withhold some of their students' free speech rights while they can be inculcated and familiarized with the American values system, which prizes the responsible exercise of free speech.²⁴⁴

But as children grow older and go to college, this understanding becomes less persuasive. At some point, schools must loosen the restraints on students and let them exercise the rights that were temporarily withheld. Once students have developed the values and skills they need to be responsible citizens, they ought to be able to test their ideas in a free environment. For example, in an American society that highly values the

244. See Hafen & Hafen, *supra* note 70, at 386-91.

freedom to question authority, people eventually ought to be given the freedom to question authority. As high school students become adults, some decrease in the number of “legitimate pedagogical concerns” exercised by colleges seems not only inevitable, but also wholly appropriate—indeed, required by the basic values informing the American legal and political systems.

The question is how much loosening is appropriate? A powerful case can be made that colleges still have some interests in limiting students’ freedom to say anything they want, at least when that speech uses school-sponsored mediums. Student publications, acting classes, and other classroom-based enterprises are still learning experiences, and where the school has not opened up the forum as public and turned responsibility over to the students, it ought to be able to ensure that students learn the lessons it wants them to learn. To turn a college publication into an absolute “marketplace of ideas,” where free speech is valued above the college’s educational mission, would undermine the educational purpose of the college by preventing it from teaching the lessons it needs to teach.

Based on these fundamental assumptions that universities should be permitted to control their educational missions, and that college students should have greater free speech rights than high school students, courts ought to allow colleges to restrict the content of student speech that occurs in school-sponsored forums that are nonpublic forums only when one of two circumstances applies: (1) the speech fails to satisfactorily fulfill the requirements of an assignment, or (2) the instructor or the college reasonably believes that the speech itself is unprotected by the Constitution or might violate the law.²⁴⁵

Before going further, one point bears repeating: this test applies *only to publications that are nonpublic forums*. Decisions to restrict the content of student publications that are public forums are, and should be, subject to strict scrutiny.²⁴⁶

245. Of course, because the college’s retention of content control defines a nonpublic forum, it will often be the exercise of the ability to restrict content that makes the publication a nonpublic forum in the first place. This means that the analysis as to whether a publication is a public forum will sometimes overlap with the analysis as to whether it had “legitimate pedagogical concerns” for exercising control, but it should not alter the outcome as to whether a particular restriction is constitutional.

246. Similarly, if a college administrator successfully argues that an attempt to restrict the content of a publication was actually an attempt to turn the public forum into a nonpublic forum, the test set forth above should apply to that attempt.

A. THE “FULFILL THE REQUIREMENTS” RULE

The “fulfill the requirements” rule relies on the assumption that one of the most fundamental ways colleges advance their pedagogical missions is by giving students assignments and grading those assignments based on how well the students fulfill their requirements. Based on this assumption, it is eminently reasonable to suggest that universities ought to be able to hold students accountable when their work does not fulfill the basic requirements of an assignment. Where the work was done with the eventual purpose of being published in a school-sponsored medium, holding people accountable means not publishing that work. This idea is the essence of the rule.

The rule states: Where the speech fails to satisfactorily fulfill the requirements of an assignment, the school has a “legitimate pedagogical concern” in restricting the speech.

As an easy application of the rule, suppose the instructor of a laboratory class that produces a student newspaper assigns a student reporter to write a feature story profiling the chairman of the art department. The student returns an opinion-filled tirade about why pot smoking should be allowed in the dorms. In such a case, the instructor ought to be able to stop that article from being published simply because it does not meet the criteria of the assignment. The student has made no attempt to learn the lesson the instructor was trying to teach, which presumably was how to write feature profiles. To not allow the instructor to restrict this student’s speech would be to allow the student to take control of the lesson plan of the class, a power that ought to remain squarely in the hands of the instructor.

Now imagine a more difficult case. Suppose that after receiving the same assignment, the student returns with an article that makes fun of the art department chairperson’s looks, and criticizes him for being fat and ugly. Such an article is so far removed from the proper tone and content of any journalistic work, let alone a feature article, that a strong case can be made that it also fails to fulfill the requirements of the assignment. This is a closer case than the example involving pot smoking in the dorms because on some level, the article is a profile of the art department chair. Nonetheless, it falls outside the parameters of the assignment, which was to

report and write a nonopinionated profile that follows basic journalistic norms.²⁴⁷

Still, the power over student speech that this rule gives to instructors is far from unlimited. For assignments that are open-ended, instructors will have less power to restrict their content. In other words, the more discretion that is left to the student over subject matter, tone, or other content issues, the less likely it is that the instructor can later say the assignment is inappropriate for publication.²⁴⁸ For example, suppose that rather than asking the student to write a feature profile of the art department chair, the professor assigns the student to write a feature profile about any interesting person the student can find. In response, the student turns in an article profiling a student who pays for college by performing in strip clubs.²⁴⁹ This article would fulfill the requirements of the assignment—surely the profile subject leads an interesting life—and under the rule, it would be unreasonable for the professor to stop the publication of this article merely because the professor disapproves of the profile subject's activities. In a high school, the professor would probably be permitted to stop this article's publication on the ground that its content may be inappropriate for some students, but in a college, the professor should not be able to use the same reason. Rather, the professor ought to be limited to ensuring that the student fulfills the requirements of the assignment.

Extended beyond the publication context, this rule would permit the holdings of both *Axson-Flynn* and *Li* (had *Li* been decided under a *Hazelwood* analysis). In *Axson-Flynn*, one aspect of the acting student's assignment was to step into the persona of a character whose values she disapproved of, and her failure to do so constituted a failure to achieve one of the fundamental pedagogical purposes of the assignment.²⁵⁰ *Li* is a slightly closer case. On one hand, one of the pedagogical purposes of the student's master's thesis was for him to learn the proper style and tone of academic writing. His "Disacknowledgments" section surely fell outside

247. If the article submitted by the student went so far as to maliciously make false, defamatory remarks about the art department chair, the school would also have another means for restricting the content under this Note's proposed test: false, defamatory speech is excluded from constitutional protection, and the "illegal speech" rule proposed below contends that schools should have the power to restrict the content of such speech. For a discussion of the "illegal speech" rule, see Part V.B, *infra*.

248. The question of how much control is left to the student is properly characterized as a factual question and should be resolved at trial, if one is necessary.

249. Assume for purposes of this Note that the subject consented to the article's publication. If the subject did not consent, invasion of privacy problems could arise, and the teacher or school might be able to stop publication using the "illegal speech" rule. See *infra* Part V.B.

250. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280, 1282 (10th Cir. 2004).

this tone, so a fairly strong case could be made that he failed to meet the criteria of the assignment.²⁵¹ On the other hand, the most important pedagogical purposes of the thesis were for him to conduct comprehensive research and present his findings in a written composition, requirements he fulfilled satisfactorily.²⁵² Under the “fulfill the requirements” rule, a reasonable person could conclude that failure to follow directions on the “Acknowledgments” section was not sufficient to show the student really failed to do what was asked of him. Both arguments are reasonable, and neither undermines the principles of the First Amendment; however, the sheer outrageousness of the comments in the “Disacknowledgments” section suggests that the better result would be that the student failed to fulfill the requirements of the assignment.

One wonders whether the “fulfill the requirements” rule could be seen as just a simplified means of allowing instructors (and to a degree, administrators) the same broad power granted to high schools under *Hazelwood*'s “legitimate pedagogical concerns” standard. For example, one could imagine an instructor telling a student that his story failed to fulfill the requirements of an assignment and would not be published, merely because it contained minor grammatical errors. In high schools, such action would likely be constitutional, as *Hazelwood* specifically notes that poor grammar is a “legitimate pedagogical concern” for stopping publication.²⁵³ In college, under the “fulfill the requirements” rule, the same action should not be constitutional. Rather, instructors should be permitted to stop the publication only of content that fails to *satisfactorily* complete the requirements of the assignment. A rule that required students to *perfectly* or *totally* complete the requirements would restrict too much, especially given that students are still learning; while it would better ensure that only the highest-quality work is published, it would do too little to protect students' speech rights. In other words, as long as the work could earn students a reasonably good grade, the students should have the right to publish it.²⁵⁴

One critical issue is who precisely has the power to determine whether the speech fulfills the requirements of the assignment. It might seem reasonable to leave that power exclusively in the hands of the instructor, who is, after all, the person who created the assignment in the first place.

251. See *Brown v. Li*, 308 F.3d 939, 942–44 (9th Cir. 2002).

252. See *id.* at 942–43.

253. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

254. Of course, serious structural or grammatical errors could lower students' grades so dramatically that an instructor could reasonably prevent the publication of the article. For example, if a student insists on misspelling words, but offers no legitimate reasons for doing so, that student's grade would obviously suffer and the instructor would be justified in stopping publication.

Two reasons could be proffered in support of this rule. First, allowing college administrators or others to restrict speech over the objections of the instructor looks like granting those administrators veto power over a student's grade, which offends the notion of academic freedom. Second, especially in journalism classes, the college administration might be the subject of the speech in question. Imagine an administrator who becomes aware of an article produced for a student newspaper (in a nonpublic forum), in which the administrator would be portrayed in a negative light. That article may well meet all the requirements of good journalism, and the instructor may even consider it deserving of an A. Unless the power to restrict the speech is limited to the instructor, the administrator might be able to overrule the instructor on the claimed basis that the article was biased against him or her (even though it really was not), and thus failed to meet the requirements of the assignment. The administrator's own desire to be portrayed in a positive light would taint such an assertion, and allowing the administrator to restrict an article for such a reason would undermine basic free speech principles.

Still, this Note proposes that the instructor's superiors, such as the department chairperson or dean, or the university president, should have the power to overrule the instructor, but only when the instructor has abused discretion in choosing to allow the speech. The purpose of this rule is to create a check on the power of the instructor, who might otherwise abuse authority by preferring certain subjects over others, or allowing biases to creep in. For example, imagine a case involving a journalism instructor who also happened to be the faculty adviser to the university's pro-choice student group. Imagine then that this instructor assigns a student to write a news story about the search for a new dean of the education college, but the student returns with an opinion column explaining the student's unbridled support for the holding of *Roe v. Wade*.²⁵⁵ Overtaken with joy at the student's political position, the instructor allows the article to be published in the newspaper produced by the course, and even allows it to be placed under a banner headline on the front page, though it has nothing to do with the original assignment. Because the instructor has plainly ignored the assignment the instructor originally gave, the college dean would be allowed to overrule the instructor; the instructor has abused discretion by allowing the publication of an article that falls so far outside the requirements of the assignment.

255. *Roe v. Wade*, 410 U.S. 113 (1973).

Because the rule allows administrators to overrule instructors only when the instructors have abused their discretion, it offers a strong protection against the two justifications for granting exclusive control to instructors. First, the proposed rule does not violate a reasonable understanding of academic freedom. It is unreasonable to argue that instructors' academic freedom gives them the right to run classes according to their own whims, particularly when those whims contradict the basic pedagogical purposes of their classes. This understanding of academic freedom is consistent with decisions that have allowed administrators to overrule the grading decisions of instructors in some circumstances.²⁵⁶

Second, the abuse of discretion standard protects against attempts by college administrators to overrule instructors' decisions when their reasons for doing so are solely to protect their own interests. It is reasonable, appropriate, and even desirable for an instructor to allow the publication of an article critical of the college administration, provided that the article fulfills basic journalistic standards. Thus, attempts by administrators to stop the publication of articles solely because they make them look bad would violate this rule.

Of course, this rule could give rise to some close cases, particularly where administrators make pretextual arguments for stopping the publication of an article. Suppose an instructor allows the publication of an article critical of the administration that, while containing imperfections and not perfectly balanced, is still a reasonably good article for a college journalist. Suppose then that the administrator overrules the instructor, claiming the instructor abused discretion in printing the article, which the administrator argues fell short of the minimum requirements of the assignment. In these cases, courts should make clear that because the standard requires that the instructor have abused discretion, the instructor's decision should stand, especially given the conflicting interests of the administrator and the importance of the student's freedom of speech.²⁵⁷ The fact that the rule merely requires that the student's completion of the

256. See, e.g., *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001) (holding that professors do "not have a First Amendment right to expression via the school's grade assignment procedures," and that a professor's First Amendment rights were not violated when the university president told him to change a student's grade). *But see Parate v. Isibor*, 868 F.2d 821, 828-30 (6th Cir. 1989) (holding that a university may not force a professor to change a student's grade because doing so amounts to compelling his speech, even though a university is free to change a student's grade itself, without going through the instructor).

257. Note again, though, that if the administrator reasonably believes that the speech is excluded from constitutional protection, or could give rise to a legal cause of action, he might still be able to stop its publication by using the "illegal speech" rule. See *infra* Part V.B.

task be satisfactory, rather than perfect, would further insulate the student and the instructor from the administrator's bias.

Two more loose ends are worth tying up. The first deals with instances when other students, presumably acting as editors of the nonpublic forum publication, give the specific assignment, but an instructor still has authority over the content of the publication. Suppose the instructor of a course that produces a newspaper allows student editors to assign particular articles to student reporters. If the editor gave an assignment asking a reporter to turn in a virulent diatribe about how ugly the provost was, and that reporter did so, the students might contend that the instructor has no right to stop the publication of the article because, strictly speaking, it fulfills the assignment given by the editor. Such an argument sounds clever, but should lose. In such a circumstance, the instructor ought to have the power to stop the publication of the article, not because the reporter failed to fulfill the requirements of the assignment, but because the editor did. Assigning such an article is almost certainly outside the scope of discretion given to the editor by the instructor, so it fails to fulfill the requirements of the editor's assignment. If, in a moment of egregious pedagogical incompetence, the instructor actually allowed the editor to assign such a story, it would be reasonable for an administrator to step in and stop the article's publication, on the theory that the instructor abused discretion by giving such freedom to the editor.

The second loose end involves publications that are not produced as part of a class. Given that extracurricular publications can still be nonpublic forums where advisers exercise close control over their content, but do not actually grade work or give students course credit, such situations are likely quite common. In these cases, the free speech interests of the students are not in conflict with the pedagogical interests of the school because extracurricular activities are not intended to provide the same structured learning environment as the classroom, where students complete assignments with the goal of learning particular lessons determined by the instructor. Absent this conflict of interest, it would make little sense to apply the rule.²⁵⁸ So where the publication is not produced for credit, but is instead extracurricular, the college should not have the power to restrict its content under the "fulfill the requirements" rule.²⁵⁹

258. The same will not be true of the "illegal speech" rule, where many of the interests protected by the rule apply regardless of whether the speech occurs as part of a curriculum. *See infra* Part V.B.

259. Cases could also arise involving students who write articles for publications that are clearly part of the university, such as alumni magazines or department newsletters. In such cases, the students are clearly acting as employees of the school, so the school should have total control over their speech.

One could probably stop here, and have a rule that does a reasonably good job of protecting students' free speech rights while protecting colleges' power to carry out their pedagogical missions. But there is a particular subset of student speech that colleges ought to have more power to restrict because of the harms that the speech can bring about. This Note now turns, therefore, to the proposed "illegal speech" rule.

B. THE "ILLEGAL SPEECH" RULE

The second rule is based on the understanding that free speech is not without its legal limitations, and that colleges ought to have leeway in stopping speech that would violate the law. Even outside the academic realm, liability for speech can arise when the speech is libelous,²⁶⁰ obscene,²⁶¹ or directed to inciting likely imminent lawless action,²⁶² because in those (and a few other) situations, the speech falls outside the protection of the First Amendment. Liability can also arise where the speech might give rise to a tort cause of action, such as invasion of privacy or intentional infliction of emotional distress.²⁶³ Learning these laws is so important not only because conscientious students must be aware of the limits of their speech rights, but also because it is when they exceed those limits that their speech does the most damage. For example, one of the most powerful weapons journalists have is the ability to destroy somebody's reputation, and student journalists ought to be taught the importance of brandishing that weapon responsibly. Libel laws protect against improper attacks on people's reputations, and it would be appropriate for colleges to step in to protect people's reputations when students are about to unfairly and illegally harm them.

This situation justifies the second rule, which states: Where the college reasonably believes that the student speech might give rise to a legal cause of action, or where the college reasonably believes the speech is

In such situations, the school employees are in the position of the students' editors, and should not even have to meet the "fulfill the requirements" rule in order to restrict the students' speech. *See Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1330 (2006).

260. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

261. *See Miller v. California*, 413 U.S. 15 (1973).

262. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

263. It should be apparent by now that the word "illegal" in the name of the rule is not intended to be synonymous with "criminal." Rather, it is used more loosely as a label for all speech that is excluded from constitutional protection, or that might give rise to a legal cause of action. After all, the "illegal speech" rule is a bit more concise than the alternative "speech that is excluded from constitutional protection or that might give rise to a legal cause of action" rule.

excluded from constitutional protection, it has a “legitimate pedagogical concern” in restricting the speech.

Unlike the “fulfill the requirements” rule, the “illegal speech” rule gives administrators and instructors equal power to restrict the speech; there is no abuse of discretion limitation on administrators’ conduct. Allowing the administration to overrule the instructor where the speech might be illegal is reasonable because instructors often lack the legal training to evaluate whether the speech will violate the law, while colleges typically employ or have access to legal counsel who can better make that determination. The more expansive grant of power to administrators is reasonable in light of the fact that it is subject to a reasonableness standard. This offers student journalists a degree of protection from being targeted by administrators seeking to silence legitimate criticism of their own actions. If an administrator stopped publication of an article critical of one of the administrator’s policy initiatives, claiming that the article libeled the administrator, the action would be upheld only if the administrator *reasonably* believed the article libeled her.

Admittedly, sometimes administrators’ reasonable beliefs will be incorrect, and they will be permitted to restrict some speech that would not actually be unconstitutional or tortious. But rules requiring people to predict the outcome of court cases ought to allow those people some leeway when they are acting in good faith. Besides, where speech pushes the lines of libel, obscenity, incitement, or invasion of privacy, the harm caused by the speech often substantially outweighs its good, so it would be reasonable to err on the side of colleges in these limited circumstances,²⁶⁴ even though their power to do so admittedly gives students less freedom than they would have in the outside world.²⁶⁵

This rule provides a relatively simple and predictable basis for administrators to determine whether they may take action against the

264. The need to protect against this type of harm is the reason this rule should be applied equally to both curricular and extracurricular speech, while the “fulfill the requirements” rule will not apply to extracurricular speech.

265. Depending on the context, concerns about the “illegal speech” rule might even be so serious as to satisfy strict scrutiny and allow administrators to restrict the content of publications that are limited public forums. Though a detailed discussion of such concerns is beyond the scope of this Note, an obvious example would be a newspaper article in favor of assassinating the university president, and encouraging students who are willing to take up arms for that cause to meet in a particular place at a particular time, where weapons will be provided. Such speech would almost certainly be unprotected under *Brandenburg*, and a restriction against it should be upheld even under strict scrutiny. By contrast, it is difficult to imagine a situation where speech that would be restricted under the “fulfill the requirements” rule would be so problematic that the restriction would satisfy strict scrutiny.

publication. Where the college administrator consults the college's counsel before taking action against the publication and follows counsel's advice about whether the speech is illegal, the administrator would almost certainly be protected against subsequent legal action by the students. Colleges would also be wise to ensure that the person making the ultimate decision about whether to restrict the speech is not the same person targeted by the speech. So if the speech targets the dean of students, someone else, preferably outside the dean of students's office, should decide whether the speech could reasonably be perceived as illegal. Such a practice would remove some, though not all, of the perception that the administrator was acting out of self interest, rather than according to neutral and detached legal principles.²⁶⁶

This rule strongly values the free speech rights of college students. Provided they are speaking within the bounds of the law, the students will almost always be protected against unfair restrictions on what they say. They will be free to express, share, and develop ideas in a forum that prepares them for the freewheeling discourse that characterizes American political life. Thus, the rule is consistent with an understanding of colleges as a "marketplace of ideas," albeit a regulated marketplace, because it does place some limits on student speech. It also reflects the understanding of *Tinker* and its supporters about the importance of free and robust dialogue in American political and cultural life.

One might wonder at this point whether this standard would allow administrators to restrict speech like that at issue in *Hosty*. Recall that those articles involved scathing critiques of university faculty and administrators. Under the "illegal speech" rule, if the articles merely contained harsh, or even unfair language, the administration would probably not be able to stop them, as a libel case cannot be made without factual assertions.²⁶⁷ But if those articles actually contained defamatory falsehoods that a reasonable person could believe were made with knowledge of falsity or reckless disregard for truth,²⁶⁸ the administration would have the power to stop them.²⁶⁹

266. Administrators seeking to overrule an instructor under the "fulfill the requirements" rule would be wise to follow a similar practice.

267. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–20 (1990).

268. In such a situation, the statements would be excluded from constitutional protection, assuming the university administrators being criticized were public figures. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964).

269. The "fulfill the requirements" rule would be inapplicable to the *Hosty* case, as the articles were not generated as part of an assignment.

C. DISTINCTIONS BETWEEN STUDENTS' RIGHTS UNDER THIS TEST AND
THE GENERAL PUBLIC'S SPEECH RIGHTS

Even though these rules allow colleges to restrict speech in only limited circumstances, they still give colleges substantially more power to restrict speech than government has over the general public. The key difference is that these rules effectively amount to prior restraints on speech, as opposed to a subsequent punishment like a prosecution for libel. Prior restraints are considered among the most serious restrictions on speech, and are generally not permitted even where the publication contains speech that would otherwise violate the law. Rather, prior restraints bear a heavy constitutional presumption against their validity, and are upheld only in extraordinarily rare circumstances.²⁷⁰ In the limited context of speech that fails to fulfill this requirement, however, a prior restraint is reasonable to the limited degree allowed by this rule because it allows colleges to fulfill their pedagogical missions about teaching students the limits of free speech, and because it offers students themselves a degree of protection from suit while they remain in an educational setting. Such concerns do not apply in non-academic settings.

D. A WORD ON WORKABILITY

The tests proposed here attempt to strike a balance between students' interests in free speech and colleges' interests in controlling their curriculums. Perhaps the biggest shortfall of these tests, especially the "fulfill the requirements" test, is that they are prone to abuse by overzealous administrators who might interpret them more broadly than courts intend. Such a risk is compounded by the fact that in colleges, administrators and instructors have enormous influence on students, most notably by wielding control over grades, so students may feel uncomfortable speaking out against abuses. One could argue that to offset this risk, courts should adopt a rule that provides more ample protection to students, and more restrictions on colleges. Such a rule, though, would ignore the genuine pedagogical concerns colleges have in giving students assignments, and ensuring that the students both fulfill the assignments' requirements and do so in ways that are not illegal. A failure to balance

270. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714, 718 (1971) (per curiam) (holding that the federal government could not stop a newspaper from publishing classified documents, which it argued endangered national security). See also *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.").

these interests would ignore the fact that colleges have other functions besides operating as “marketplaces of ideas.” If colleges were not allowed some degree of control over student speech in nonpublic forums, it could allow students to hijack course curriculums and turn instructors into mere bystanders, not leaders of the learning process. Such abuse by students hardly seems more desirable than abuse by colleges. Nonetheless, the risk of abuse by colleges is real, and courts, as well as the professional press and society at large, should continue pushing strongly to protect against administrative overreaching.

VI. CONCLUSION

The word “*Hazelwood*” has struck fear in the minds of high school journalists for nearly two decades, so one can understand why college journalists might have initially reacted with trepidation when the Seventh Circuit said in *Hosty* that *Hazelwood*’s framework should apply to colleges as well. But trepidation and hysteria are hardly the same, and much of the reaction to *Hosty* is better characterized as the latter. The fact is that *Hazelwood*’s framework has been applied repeatedly in student speech cases; the only new ground broken by *Hosty* was with regard to explicitness. Rather than pretending not to apply *Hazelwood* while actually doing so, as the Sixth Circuit did in *Kincaid*, the Seventh Circuit was simply being honest in *Hosty* when it held that *Hazelwood*’s framework applied to colleges.

Even under that framework, though, college students’ freedom of speech is not likely to be restricted nearly as harshly as that of high school students. First, many if not most college publications are limited public forums, in which very few outside restrictions on content will be permitted. Second, those publications that are nonpublic forums may well find that the “legitimate pedagogical concerns” standard does not have such an expansive meaning in colleges as it does in high schools.

Nonetheless, there is no doubt that the meaning of “legitimate pedagogical concerns” in the college context remains unclear, so courts should adopt a two-part rule defining when colleges may restrict the content of school-sponsored student speech in nonpublic forums. First, they should be able to restrict it when the speech fails to satisfactorily fulfill the requirements of the assignment. Under this rule, great discretion should be given to instructors to determine whether the speech meets the assignment’s requirements, while administrators’ decisions to overrule an instructor should be upheld only when the instructor abused discretion.

Second, either the instructor or the administration should be permitted to restrict the content of the speech based on a reasonable belief that the speech is excluded from constitutional protection or might give rise to a legal cause of action. This standard, while admittedly not flawless, balances the need of colleges to pursue their own pedagogical missions against the free speech interests of college students, who should have broad, but not unlimited, rights to speak in a “marketplace of ideas.”